UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CASE NO. 3:24-CV-_____

SMARTSKY NETWORKS, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**COMPLAINT**
	)	
GOGO INC.; GOGO BUSINESS AVIATION LLC; and GOGO INTERMEDIATE HOLDINGS LLC,	)	**(JURY TRIAL DEMANDED)**
	)	
Defendants.	)	

COMPLAINT

This case is about an abusive monopolist illegally blocking an innovative startup from entering its market. Gogo is the abusive monopolist. SmartSky was the innovative startup. The relevant market is for air-to-ground (ATG) broadband inflight connectivity (IFC) products and services for business aviation (BA)[1] aircraft in the United States—the technologies used to connect private planes to high-speed internet.

Gogo admits that it's a monopolist. In fact, Gogo trumpets its monopoly power to investors. For example, in 2018, Gogo's CEO proudly proclaimed:

> "We have close to 5,000 broadband planes . . . in Business Aviation, and SmartSky is still looking for their first. ***So we've got a long ways to go before you can even conceivably have a duopoly***."[2]

[1] Business aviation aircraft are not to be confused with commercial aviation aircraft, the planes operated by commercial airlines like American Airlines, Delta Airlines, United Airlines, etc.

[2] Gogo, *Q4 2017 Gogo Inc. Earnings Call*, Thomson Reuters StreetEvents, Feb. 22, 2018, at 15 (Gogo President, CEO & Director at the time commenting on SmartSky's attempted entrance into the market) (emphasis added).

SmartSky posed a permanent threat to Gogo's monopoly. When SmartSky attempted to enter the market, Gogo was only selling what it publicly described as "antiquated" technology. That technology was, by Gogo's own admission, unable to satisfy the growing consumer demand for better, stronger, and faster connectivity.[3] SmartSky's Network[4] filled that void, performing far and above anything Gogo had ever offered, and therefore threatened to both capture a substantial portion of Gogo's current customers and penetrate the large number of unconnected business aviation aircraft that Gogo had been unable to reach for so long.

To prevent that from happening, Gogo undertook a comprehensive anticompetitive campaign to block SmartSky from the market and maintain its monopoly. Among other means, the abusive and illegal acts Gogo committed in furtherance of this campaign included:

- deliberately deceiving the market about the technological capabilities of Gogo's current and forthcoming technologies;
- intentionally misleading the market about when Gogo's forthcoming technology would be available;
- selling its current technologies together with the promise of free future upgrades to its forthcoming technologies and pricing the bundle below costs;
- entering anticompetitive exclusive or *de facto* exclusive dealing agreements across all levels of the market; and
- misleading potential SmartSky purchasers and outside investors about SmartSky's technology.

[3] *See* Letter from Counsel to Gogo Business Aviation, LLC to Marlene H. Dortch, Secretary of Federal Communications Commission (January 20, 2016), https://www.fcc.gov/ecfs/document/60001380502/1 (last accessed Dec. 3, 2024)("Gogo needs additional spectrum capacity to reliably provide the in-fight broadband and other communications services that consumers expect and demand.").

[4] The "SmartSky Network" was a software defined ATG network incorporating various 4G LTE and 5G technologies to enable high-speed data communications in-flight. The SmartSky Network included 5G components such as beamforming, software defined radios, network function virtualization, network slicing, primary internet gateway relocation, and low latency architecture.

Gogo got what it wanted. By lying and cheating, Gogo stole SmartSky's chance to enter the market, forced SmartSky out of business, and maintained its monopoly.

To remedy the harm Gogo caused, SmartSky brings this action under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2; Section 3 of the Clayton Act, 15 U.S.C. § 3; Section 43(a) of the Lanham Act, 15 U.S.C. § 1125; North Carolina's Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1 *et seq.*; and North Carolina's state tort laws.

PARTIES

1. Plaintiff SmartSky Networks, LLC is a Delaware limited liability company with its former principal place of business in Morrisville, North Carolina.

2. Defendant Gogo Inc. is a Delaware corporation and "holding company that does business through its subsidiaries."[5]

3. Defendant Gogo Intermediate Holdings LLC is a Delaware limited liability company and a direct, wholly owned subsidiary of Gogo Inc.

4. Defendant Gogo Business Aviation LLC is a Delaware limited liability company registered to do business in North Carolina, maintains a registered agent and registered office in North Carolina, and is a direct, wholly owned subsidiary of Gogo Intermediate Holdings LLC.

STATEMENT OF JURISDICTION AND VENUE

5. This Court has jurisdiction over SmartSky's federal law claims brought under 15 U.S.C. §§ 1, 2, 14, and 1125 pursuant to 28 U.S.C. §§ 1331 and 1337.

6. This Court has supplemental jurisdiction over SmartSky's state law claims pursuant to 28 U.S.C. § 1367.

[5] Gogo, Inc. Annual Report (Form 10-K)(Feb. 28, 2024) at 13 (hereinafter "Gogo 2023 10-K").

7. This Court has personal jurisdiction over the Defendants pursuant to 15 U.S.C. § 22 because the Defendants operate their network and transact business in North Carolina.

8. Gogo Inc. describes and holds out Gogo Business Aviation LLC as the "principal operating subsidiary" of Gogo Inc.

9. Gogo Inc.'s 2023 Form 10-K explains: "[R]eferences to 'we,' 'us,' 'our,' 'Gogo,' or the 'Company' refer to Gogo Inc. and its directly and indirectly owned subsidiaries ***as a combined entity***."[6]

10. Incorporating that definition, Gogo Inc.'s 2023 Form 10-K reports that:

- "[Gogo Inc., Gogo Intermediate Holdings, and Gogo Business Aviation] are currently developing a next generation ATG network using 5G technology, unlicensed spectrum, and licensed spectrum."[7]

- "Simultaneous with the development of Gogo 5G, [Gogo Inc., Gogo Intermediate Holdings, and Gogo Business Aviation] are actively working with a subset of AVANCE customers and customers utilizing [Gogo Inc., Gogo Intermediate Holdings, and Gogo Business Aviation's] legacy Gogo Biz ATG airborne system operating on [Gogo Inc., Gogo Intermediate Holdings, and Gogo Business Aviation's] ground 3G and 4G networks to transition to an AVANCE system compatible with a new LTE network."[8]

- "[Gogo Inc., Gogo Intermediate Holdings, and Gogo Business Aviation] expect to commercially launch our fourth ATG network – Gogo 5G – in the fourth quarter of 2024."[9]

11. Upon information and belief, Gogo Inc., Gogo Intermediate Holdings LLC, and Gogo Business Aviation LLC share the same principal place of business.

[6] *Id.* (emphasis added).
[7] *Id.* at 19.
[8] *Id.* at 4.
[9] *Id.*

12. In public court filings, Gogo Inc. and Gogo Business Aviation claim to currently be "developing and intend[] to operate a 5G network" together throughout the country, including in North Carolina.[10]

13. Gogo Inc., Gogo Intermediate Holdings LLC, and Gogo Business Aviation LLC (collectively referred to in this Complaint as "Gogo") are jointly liable for the acts, omissions, and damages described in this Complaint because these entities are either: (a) a combined entity and thus one and the same; (b) acted jointly; or (c) acted as agents of one another.

14. Gogo has had continuous and systematic contacts with North Carolina. Gogo engaged in unlawful activity throughout the country, including in North Carolina. Gogo purposefully availed itself of the laws of North Carolina by conducting business and unlawful activities within this state. Gogo conducts business with customers in North Carolina and expressly touts those customer relationships on its website. And at least two of Gogo's network towers are in North Carolina.[11]

15. Venue is proper in this district pursuant to 15 U.S.C. § 22 because Gogo may be found within the Western District of North Carolina and Gogo transacts business within this district. Specifically, Gogo operates its ATG network towers and provides coverage to customers located within this district.

16. Venue is further proper in this district pursuant to 28 U.S.C. § 1391(b)(3).

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[10] *See* Defendants' Second Amended Answer and Counterclaims to Plaintiff's First Amended and Supplemental complaint for Patent Infringement ¶ 5 (Doc. No. 323), *SmartSky Networks, LLC v. Gogo Business Aviation, LLC & Gogo Inc*., Case No. 1:22-cv-00266-JLH (D. Del. 2024) ("Gogo admits that it is developing and intends to operate a 5G network."). Previously in the same document, Gogo Inc. and Gogo Business Aviation defined the term "Gogo" to refer to "Gogo Business Aviation LLC and Gogo Inc." *Id.* p. 2.

[11] *See The Gogo Network is Expanding*, https://www.gogoair.com/infographics/gogo-5g-network-deployment (last viewed Nov. 29, 2024); Seth Miller, *Gogo Completes 5G Tower Development* (Oct. 18, 2022), https://paxex.aero/gogo-5g-tower-deployment/.

FACTUAL BACKGROUND

17. This case concerns the market for air-to-ground (ATG) broadband inflight connectivity (IFC) products and services for business aviation (BA) aircraft in the continental United States. In plain English, this case is about the technologies used to connect private planes to high-speed internet.

18. ATG networks use a large system of terrestrial radio towers that send and receive signals to and from ATG systems installed onto airborne aircraft. As a connected aircraft travels across different sections of airspace, the ATG system connects to the cell tower that provides it the strongest signal (usually, the nearest), similar to cellphones on the ground.

19. There have only ever been two true competitors in this market—Gogo and SmartSky.[12]

20. Gogo has been a monopolist in the ATG market for as long as ATG has been around. From 2008 until around 2014, Gogo sold 100% of ATG systems in the United States and provided 100% of ATG services in the United States. During SmartSky's attempted entrance into the market from 2014 until 2024, SmartSky took less than 2% of Gogo's market share. Then, in August 2024 when Gogo forced SmartSky out of business, Gogo returned to its 100% monopoly status.

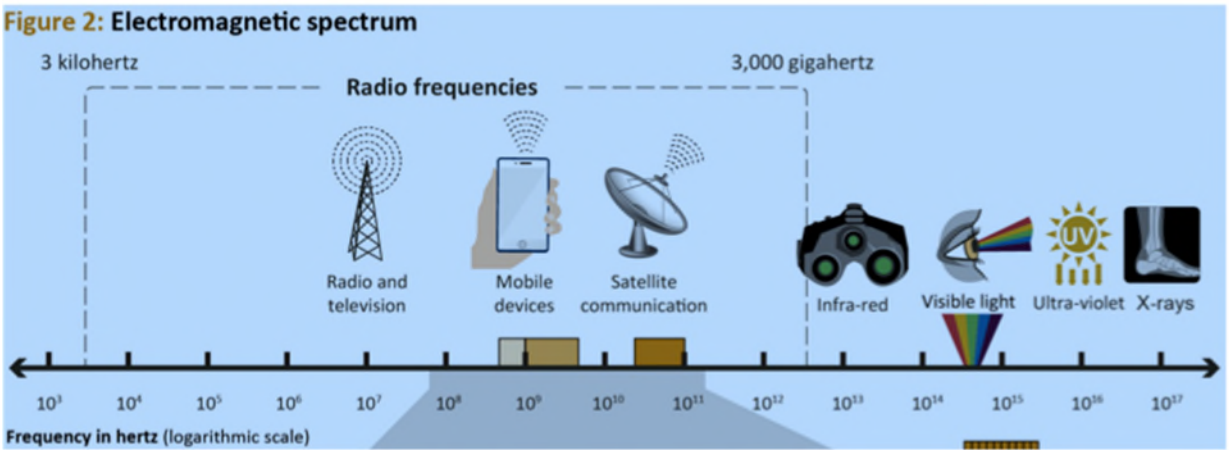
21. Understanding how Gogo became a monopoly and maintained its monopoly power requires a brief primer on the Federal Communications Commission's (FCC) control of radio signals and the ATG market's structure and characteristics.

[12] AT&T also briefly tried to enter the ATG market in 2014. It failed. *See AT&T Says it is No Longer Working to Improve the Mostly Terrible Wi-Fi Service on Airplanes*, CNN Business (November 10, 2014), https://money.cnn.com/2014/11/10/technology/mobile/att-flight-wifi/index.html.

FCC Regulations

22. All wireless communication devices—satellite TVs, cellphones, AM and FM radios, Wi-Fi, etc.—transmit information through radio signals. Radio signals are a type of electromagnetic radiation. Electromagnetic radiation frequencies are measured in Hertz (Hz), or cycles per second, and include radio signals, x-rays, gamma rays, etc.

23. The radio frequency spectrum is the part of the electromagnetic spectrum with frequencies between 3 kilohertz (kHz) and 300 gigahertz (GHz). There are a limited number of frequencies in the radio frequency spectrum usable for wireless communications. The FCC regulates the use of these frequencies in the United States, and allocates portions of the spectrum for various uses. The FCC dedicates a portion of the spectrum for public use (unlicensed spectrum), which may be used by the public without a license (essentially free of charge) while subject to specific FCC rules. The FCC licenses the remainder of the spectrum to private entities, like cellular carriers, that are entitled to exclusive use of their licensed bands (typically for a significant fee).[13]



24. The FCC has allocated a substantial—but specific—segment of the radio frequency spectrum for unlicensed use. The exact total amount of unlicensed spectrum can vary as regulations

[13] Image available at: *Radio Frequency Spectrum*, https://itlaw.fandom.com/wiki/Radio_frequency_spectrum (last accessed Dec. 3, 2024).

and technologies evolve and as the FCC designates more spectrum for unlicensed use. In this case, the key unlicensed frequencies are contained within the 2.4 GHz Industrial, Scientific, and Medical (2.4 GHz ISM) band originally used for non-commercial applications like microwave ovens and medical devices, and expanded to include wireless communications technologies like Wi-Fi and Bluetooth. The 2.4 GHz ISM band is 83.5 MHz wide, ranging from 2.400 to 2.4835 GHz.

25. There are several concepts involving the radio frequency spectrum that are relevant to understanding the ATG market.

a. Bandwidth: Technically, bandwidth is the measure of the width of a frequency range in hertz, usually Megahertz (MHz) when related to an ATG network. Functionally, bandwidth is a key metric for ATG systems because it directly correlates with how much information can pass through a type of signal.

b. Interference: The disruption of a communication signal. Although interference can be caused by environmental factors (e.g., a tree in front of a radio antenna) or natural electromagnetic radiation (e.g., a solar flare), the term is used in the ATG market mostly to refer to human-caused interference from competing radio signals. Interference is the primary reason why cellphones don't work well inside a crowded football stadium.

c. Latency: The time it takes for data transmissions to travel from one node to another—here, the time it takes for radio signals to travel from an airborne aircraft to the ATG tower on the ground to the internet and then back, often described by a 'ping' test measured in milliseconds. Real-time applications—such as videoconferencing, instant communication, and working on documents on cloud-based services—require low latency (i.e., fast data transmission). The reason business travelers demand ATG in the first place is to conduct video conferences, communicate with people on the ground, and work with documents stored in the cloud in the same manner they work on the internet in their office.

d. Speed: In the ATG market, speed refers to two things: upload speed and download speed, typically measured in Megabits per second (Mbps). Download speed refers to how fast information can be received by one device from another (in an ATG network, data from the ground tower sent to the aircraft). Upload speed refers to how fast information can be transferred from one device to another (in an ATG network, typically refers to transfer of

> information from the aircraft to the ground tower). While high download speed and low upload speed is acceptable for some applications—someone who only wants to watch Netflix on their plane, for example—business aviation ATG users demand both high-speed uploads and downloads (called "symmetrical connections") in order to facilitate, for example, a video teleconference without undue latency.

Market Characteristics

26. Firms in the ATG market have two primary revenue streams: equipment sales and monthly service charges.

27. Equipment revenues come from the wholesale sale of ATG systems to authorized dealers and business aviation aircraft manufacturers.[14] Service revenues come from monthly service payments from end users with ATG systems installed onto their aircraft. End users are (a) individuals, (b) companies that own their own jets and use them for company purposes, and (c) Fleet Operators. Fleet Operators include both private jet charterers—companies that operate (and sometimes own) a fleet of aircraft that can be chartered by the public—and fractional jet ownership companies—companies that operate (and sometimes own) a fleet of aircraft that can be used only by fractional owners.

28. Service revenues are, in the long-run, the primary source of profits for firms in the ATG market. For perspective, in 2023, Gogo's service revenues were $318 million and equipment revenues were only about $80 million.[15] However, the inverse is true for new entrants. For new entrants, equipment revenues outweigh service revenues until the number of aircraft equipped with the firm's ATG systems reaches a critical mass.[16]

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[14] In industry jargon, aircraft manufacturers are often referred to simply as "OEMs" (original equipment manufacturers).

[15] *See* Gogo 2023 10-K at 42, 58.

[16] *See* Gogo, *Q4 2014 Earnings Call*, Thomson Reuters StreetEvents, Feb. 26, 2015, at 4 ("Turning now to BA, total revenue grew 7%, to over $39 million, and service revenue grew 35%, to just over $20 million for the quarter. I want to highlight a significant milestone for you in these numbers. This was the first time BA service revenue exceeded equipment revenue. Why is this an important milestone, you might ask. Because the service revenue stream

29. ATG systems are installed onto aircraft through one of two processes: line-fits and retrofits. In a line-fit, the aircraft manufacturer installs the system onto a new aircraft while the aircraft is still on the manufacturing line. The end user that purchases the aircraft then enters into a services contract with the ATG company. When SmartSky first began attempting to enter the market around 2015, approximately 30% of ATG systems sold in the U.S. were installed onto aircraft as line-fits, with only about 750 business aviation aircraft total manufactured and sold in the United States annually at that time. In contrast to a line-fit, a retrofit is where a Federal Aviation Administration-certified facility installs an ATG system onto an in-service aircraft. When SmartSky first attempted to enter the market around 2015, approximately 70% of ATG systems sold in the U.S. were installed as retrofits.

30. The retrofit/line-fit dichotomy in the ATG market is analogous to the same dichotomy for equipment and features on cars. A new car can come with a satellite radio equipped by the factory, or a satellite radio can be installed onto a car in the aftermarket at a repair shop.

31. The FAA-certified facilities that install ATG systems and act as authorized dealers for ATG systems are called MROs (maintenance, repair, and overhaul shops). MROs both repair and maintain in-service aircraft and install aftermarket systems and equipment onto in-service aircraft. To revisit the planes-car analogy, MROs are a mix between a mechanic's shop and an auto-parts store. There are dozens of MROs in the U.S., but a small number of MROs account for a disproportionate number of ATG systems purchased and installed by MROs annually. Some MROs are owned and operated by business aviation aircraft manufacturers, some are owned and operated by Fleet Operators, and most others are independent facilities.

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has a higher margin than the equipment revenue stream. As we continue to add ATG units online, which drives service revenue growth, a growing proportion of service revenue will have a positive impact on overall margins for BA.").

32. MROs are effectively the gatekeepers to the ATG market for at least three reasons. First, ATG firms only use MROs as their authorized dealers. Second and relatedly, the majority of ATG systems are installed by retrofit, making MROs the largest class of wholesale purchasers in the ATG market. Third, when new ATG products hit the market (or any other aftermarket aircraft component, for that matter), aircraft manufacturers tend not to install them until the product has a proven track record in the aftermarket. But for products to get that track record in the aftermarket, they have to be both sold and installed by MROs.

33. The ATG market is subject to extensive FAA regulations. Three warrant mentioning here:

> - First, any equipment that is going to be installed onto an aircraft must receive a PMA (Parts Manufacturing Authority) by passing a rigorous testing process called DO-160 Environmental Conditions and Test Procedures for Airborne Equipment. This test involves shaking, shocking, spraying, freezing, baking the equipment, and more.
> - Second, before an ATG system is installed as a line-fit, the system typically must be added to the aircraft's Type Certificate.
>
> - Third, before an ATG system is retrofitted onto an aircraft, the particular model of aircraft usually must have a Supplemental Type Certificate (STC).[17] These certificates show that the FAA has certified that the equipment can be installed onto the specific aircraft model safely, will operate, and will not interfere with the operations or safety features of the aircraft. Getting an ATG system certified by the FAA requires the aircraft manufacturer or MRO working with the FAA to engineer and test the component on the aircraft. The processes can take between several weeks to multiple months and cost hundreds of thousands of dollars. Any material change to the equipment made after it receives its Type Certificate and STC requires retesting and then amending every Type Certificate and STC for which they apply. These regulatory hurdles are one of many

[17] Though not required for an ATG system to be installed onto an in-service aircraft, STCs are the predominant method of doing so. An alternative is what's called a "337", which is a one-off major alteration of a single aircraft. Whereas an STC is akin to a recipe or blueprint that can be easily duplicated and used for any aircraft of that model, a 337 can only be used for one aircraft to have the system installed.

reasons why aviation technologies struggle to keep pace with terrestrial technologies.[18]

34. There are five general types of business aviation aircraft. From largest to smallest, they are: (1) bizliner jets, (2) large cabin jets (3) super midsize and midsize cabin jets, (4) small cabin and very light jets, and (5) turboprops. Information about each is in the table below.

Type of Aircraft	Number in N. American Fleet (2021)	Range (miles)	Passengers	Purchase Price	Examples
Bizliner	119	3,800 to 11,000+	15–50	$50M to $100M	Boeing 787 Dreamliner, Airbus ACJ 319
Large Cabin Jet	4,181	3,500 to 7,500	10–18	$50M to $100M	Gulfstream G650, Dassault Falcon 900
Super Midsize and Midsize Cabin Jet	4,641	2,000 to 4,000	7–10	~$10M to 25M	Gulfstream 280, Citation Longitude, Bombardier Learjet
Small Cabin and Very Light Jets	7,106	~1,000 to ~1,500	3–6	$3M to $10M	Embraer Phenom, Cessna 500, Cirrus Vision
Turboprop	9,458	300 to 2,000	5–12	$1M to $3M	Beechcraft Kingair, Cessna Caravan, Pilatus PC-12

The Developing Market for ATG

35. The first technology used to connect private planes to the internet were GEO (geostationary earth orbit) satellite systems.

36. ATG systems effectively displaced GEO systems because ATG systems had (at the time what was only) comparable performance at a much lower price.

37. Until recently, ATG services were provided only by using licensed spectrum. The FCC allocated 4 MHz of licensed spectrum for ATG and auctioned it off in 2006. One of the four MHz was purchased by LiveTV, LLC, which it held in its Verizon Airfone subsidiary and planned to use for an ATG phone business that never developed. Gogo bought the other three MHz from

[18] As an interesting aside that is only loosely related to this case, this is why ash trays are still a part of lavatory doors on planes even though smoking has been outlawed on aircraft for decades.

the FCC for $31.3 million dollars,[19] thus purchasing an exclusive license to provide ATG in the only way technologically available at that time (according to prevailing wisdom)—through the licensed spectrum. So, just like that, Gogo bought a monopoly.

38. As one of Gogo's early successful efforts to maintain its monopoly, Gogo acquired the remaining one MHz of licensed spectrum by buying Verizon Airfone in 2013.[20] By doing so, Gogo permanently ensured that no other firm could operate an ATG network on the licensed spectrum.[21] And because the licensed spectrum was thought to be the only technologically available way of providing ATG in 2013, Gogo insulated itself from all competition.

39. To this day, Gogo has not used this additional one MHz of licensed spectrum.[22] Upon information and belief, Gogo purchased this additional licensed spectrum specifically intending, at least in part, to block future new entrants from using it to compete with Gogo. After all, in Gogo's view at the time, providing ATG without licensed spectrum was "extraordinarily risky."[23]

[19] The 144 round-long auction lasted about four weeks and involved nine Qualified Bidders. *See Auction 65: 800 MHz Air-Ground Radiotelephone Service*, Federal Communications Commission, https://www.fcc.gov/auction/65 (last accessed Nov. 30, 2024); *see also* Gogo, Inc. Annual Report (Form 10-K) (Feb. 27, 2015), at 11 (hereinafter, "Gogo 2014 10-K"); Siobhan Hughes, *JetBlue, Aircell Win FCC Spectrum Auction*, Wall Street Journal (June 5, 2006), https://www.wsj.com/articles/SB114927331369270012.

[20] Wailin Wong, *GoGo to Buy Airfone to Boost In-Flight Wi-Fi*, Chicago Tribune (Dec. 24, 2018), https://www.chicagotribune.com/2012/05/07/gogo-to-buy-airfone-to-boost-in-flight-wi-fi-2/.

[21] *Business Breakdowns: Oakleigh Thorne – Gogo: Internet for Private Jets*, Colossus (June 22, 2022), https://www.joincolossus.com/episodes/90983440/thorne-gogo-internet-for-private-jets?tab=transcript (Pinpoint citation at 32:24, Transcript p. 10)(Gogo CEO Oak Thorne affirming that "if [a new entrant] wanted to build a competing service, [it] can't, practically speaking, build a licensed spectrum service. There is no licensed spectrum for sale.").

[22] *See* Gogo 2023 10-K at ("[W]e do not currently rely upon this license for our ATG network").

[23] *E.g.*, Gogo, *Q3 2014 Gogo Inc. Earnings Call*, Thomson Reuters Street Events, Nov. 10, 2014, at 9 ("I would point out that SmartSky is using unlicensed spectrum. In our view that is an extraordinarily risky way if that is your sole spectrum position is unlicensed it could perhaps be a supplemental solution. But as your base solution unlicensed spectrum is very risky; you cannot guarantee that spectrum will stay clean for any period of time.").

40. The lack of competition made Gogo complacent, and the market noticed. Gogo's glacial improvement of its technology was despite Gogo making several self-proclaimed network "upgrades" and promising as early as July 2008 to upgrade its network to 4G LTE.[24]

41. Meanwhile, improvements in ground-based connectivity technologies for consumers (e.g., Wi-Fi) made Gogo's airborne customers all the more frustrated. The headlines speak for themselves:

- *Why GoGo In-flight Wi-Fi is Garbage* (Dec. 7, 2011)[25]
- *Why Gogo's Infuriatingly Expensive, Slow Internet Still Owns the Skies* (Aug. 26, 2015)[26]
- *Everything Wrong with Airplane WiFi and Why it Barely Works* (Feb. 23, 2021)[27]

42. As Gogo acknowledged repeatedly over the years, one of the primary reasons why its network couldn't satisfy consumers was because its licensed spectrum lacked the bandwidth to support the network that the market was demanding:

- "Based on its own experience, ***Gogo can attest to the immediate demand in the marketplace for additional in-flight broadband capacity***."[28]
- "We are currently exploring various options with respect to developing and implementing a next generation air-to-ground technology in order to increase bandwidth speeds and provide additional capacity in the contiguous United States. ***Our development and implementation of a next generation air-to-***

[24] *See Aircell Selects LTE as 4G Wireless Standard for Inflight Connectivity* (July 16, 2008), https://www.gogoair.com/about/news-events/news-releases/2008/07/aircell-selects-lte-as-4g-wireless-standard-for-inflight-connectivity/ (describing Aircell, Gogo's predecessor company, as planning to launch a 4G ATG network in July 2008).

[25] *Why GoGo In-flight Wi-Fi Is Garbage*, https://om.co/gigaom/why-gogo-in-flight-wi-fi-is-garbage/ (last accessed Dec. 2, 2024).

[26] Sam Grobart, *Why Gogo's Infuriatingly Expensive, Slow Internet Still Owns the Skies*, Bloomberg (Aug. 26, 2015), https://www.bloomberg.com/features/2015-gogo-airplane-wireless-internet/?embedded-checkout=true.

[27] Michelle Yan Huang, *Everything Wrong with Airplane WiFi and Why it Barely Works*, Business Insider (Feb. 23, 2021), https://www.businessinsider.com/in-flight-wifi-is-slow-and-expensive-2019-9.

[28] Gogo Inc., *Comments of Gogo Inc.* GN Docket No. 13-114, RM-11640 (August 26, 2013), https://www.fcc.gov/ecfs/document/6017464828/1.

> ***ground technology will require that we obtain rights to sufficient 14 GHz spectrum or other spectrum***."[29]

43. For perspective, the 3 MHz of licensed spectrum Gogo's network uses is about 0.05% the bandwidth of the 5,600 MHz of spectrum licensed for cellphone networks.

44. To try to solve its lack of bandwidth problem, Gogo went back to the same hand that originally fed it—the FCC. Gogo made multiple public requests to the FCC for additional spectrum to be allocated to ATG beginning as early as September 2011. In its January 2016 request, Gogo wrote:

> "Gogo needs additional spectrum capacity to reliably provide the in-fight broadband and other communications services that consumers expect and demand."[30]

45. All of Gogo's efforts failed. The FCC would not license more spectrum for ATG.

SmartSky's Attempted Entry into the Market

46. While Gogo was beating that dead horse, a scrappy startup in North Carolina called SmartSky was revolutionizing ATG technology.

47. SmartSky had multiple key technical features and benefits that Gogo lacked:

- SmartSky's software defined network was based on 4G LTE (and later 5G) technology, Gogo was 3G;
- SmartSky's Network operated on 60 MHz of unlicensed spectrum—twenty times the bandwidth of Gogo's 3 MHz of licensed spectrum;
- SmartSky was typically ten times faster than Gogo for both uploads and downloads;
- SmartSky's equipment and services were about the same price as Gogo's (until Gogo cut its prices, as explained below); and

[29] *See* Gogo, Inc., Annual Report (Form 10-K) (Feb. 25, 2016), at 12 (hereinafter "Gogo 2015 10-K") (emphasis added).

[30] *See* Letter from Counsel to Gogo Business Aviation, LLC to Marlene H. Dortch, Secretary of Federal Communications Commission (January 20, 2016), https://www.fcc.gov/ecfs/document/60001380502/1 (last accessed Dec. 3, 2024).

- SmartSky's technology used phased array beamforming antennas that reduced interference and increased signal power and efficiency.[31]

48. To use less technical terms, SmartSky's Network delivered to consumers in the ATG market what they had been demanding from Gogo for years: internet connectivity and performance that could closely replicate their ground-based experiences, needs, and expectations.

49. From a cost and performance standpoint, there was no reason to buy Gogo instead of SmartSky.

50. In October 2014, SmartSky first announced that it would be launching its revolutionary network, targeting a launch date in 2016.

51. In October 2015, SmartSky started making pre-launch sales. In this early stage—before the market had accepted all of Gogo's lies and before Gogo started cheating—SmartSky sold over 100 systems.

52. SmartSky faced and overcame many challenges after that initial announcement, which required it to revise its launch date periodically throughout the years.

53. SmartSky announced that it was feature complete in June 2021 and had achieved nationwide coverage in July 2022.

54. SmartSky's attempted market entry was a blockbuster industry development. With the market dominated by a monopolist with such a widely disappointing product for so long and

[31] Phased array beamforming antennas generate and direct multiple radio beams to a small area, as opposed to an omnidirectional signal or shared sector-wide signal like that typical of 3G cellular systems and Gogo's legacy ATG systems. Because these beams are directed to a small area, multiple beams can be generated at the same frequency without interfering with each other, or with other transmissions using the unlicensed band. Beamforming also increases signal power and uses power more efficiently. In the unlicensed band, the FCC has set certain rules limiting the amount of power that can be used to transmit a signal to limit the amount of interference created by multiple omnidirectional signals. But with narrow beams, the FCC allows higher power, meaning a beam can be transmitted over a greater distance to a focused area without causing harmful interference with other transmissions using the same unlicensed band.

the striking superiority of SmartSky's technology, SmartSky earned wide acclaim. For example, in 2024, SmartSky was awarded an Aviation Week Laureate Award by Aviation Week Network honoring extraordinary achievements in aerospace (the Academy Awards of aviation).[32] And in the same year, SmartSky was named the first-ever Best of the Best in inflight connectivity by Robb Report.[33]

55. SmartSky was also immediately recognized as a lethal threat to Gogo's monopoly. Industry experts reported that if SmartSky was able to bring its network to market before Gogo could respond, "many of the almost 6,000 aircraft flying with Gogo ATG technology could be expected to migrate to [SmartSky] over the course of the next five to ten years due to its superior product."[34]

56. And that success wouldn't be just a flash in the pan. First-movers in the ATG market benefit enormously from a market characteristic called "stickiness." Stickiness means that once an ATG system is installed, it tends to stay there—about twenty years according to Gogo.[35] In fact, Gogo's CEO said in June 2022 that despite Gogo being installed onto over 7,000 aircraft, "almost nobody's ever taken [a Gogo ATG system] off" an aircraft (except to install a new Gogo system).[36]

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[32] *See, e.g., Press Release: Winners Announced for Aviation Week Network's Annual Laureate Awards* (Nov. 14, 2023), https://aviationweek.com/aerospace/press-release-winners-announced-aviation-week-networks-annual-laureate-awards.

[33] *See* Michael Verdon, Julie Boatman, *The Best in Aviation*, (June 12, 2024) https://robbreport.com/best-of-the-best/gallery/2024-botb-aviation-1235639011/.

[34] Valour Slideshow, p. 4, attached as **Exhibit A**.

[35] Gogo, *Q3 2021 Earnings Call*, Refinitiv StreetEvents, Nov. 4, 2021, at 3 ("I think it's also important to note that once installed and activated, our service revenue is extremely sticky. From the time we started computing churn in 2017 until now, we've averaged a 0.5% monthly churn rate, which implies a 17-year equipment life on an aircraft. That's driven by high customer satisfaction, combined with the fact that it's very expensive and time-consuming to install a new system.").

[36] *Business Breakdowns: Oakleigh Thorne – Gogo: Internet for Private Jets*, Colossus (June 22, 2022), https://www.joincolossus.com/episodes/90983440/thorne-gogo-internet-for-private-jets?tab=transcript (Pinpoint citation at 20:12, Transcript p. 4) ("Thorne Podcast").

57. There are two primary and related reasons for this stickiness. First, it is expensive to remove and replace ATG systems.[37] Depending on the configuration, the combined hardware and installation costs range from $100,000 to $300,000 or more.[38] Second, retrofitting an ATG system onto an aircraft requires grounding that aircraft, often for several weeks. People who pay millions of dollars to own business aviation aircraft are not eager to have them sit idle in a repair shop for that long. Moreover, for the large portion of business aviation aircraft owners who offset the cost of owning the aircraft by leasing it to Fleet Operators, this idle time spent retrofitting amounts to considerable lost revenue.

Gogo's Anticompetitive Response to SmartSky's Attempted Entry

58. Gogo knew about SmartSky's technology since about 2014, and beginning in 2016, Gogo believed that SmartSky's launch was imminent.[39]

59. Gogo was backed into a corner. With its monopoly threatened by its first true competition, growing consumer dissatisfaction with its own technology, and the FCC refusing to license it more spectrum, Gogo's only hope to save its monopoly was to lie and cheat to illegally block SmartSky's chance to enter the market.

60. On the exact same day in that SmartSky announced it had received FCC certification for its new network using 60 MHz of the 2.4 GHz unlicensed spectrum band, Gogo announced that it was launching a "Next-Generation" ATG network using 60 MHz of "unlicensed

[37] *See* Thorne Podcast p. 5 ("So like almost nobody's ever taken it off. And that's because the switching costs are high and you really need to want to make a change."). In other jargon, ATG systems have high "rip and replacement" or "switching" costs.

[38] *See* Thorne Podcast p. 6 ("it's probably like 300,000 the first time you put somebody in, if it's a ATG system").

[39] *See* Gogo, Inc., Annual Report (Form 10-K) (Feb. 27, 2017), at 28, 33 (hereinafter, "Gogo 2016 10-K").

spectrum, a proprietary modem and a new beam-forming antenna."[40] Just a couple of days later, Gogo confirmed that it too would be in the 2.4 GHz band.[41]

61. Of course, Gogo—and the entire world—had known about SmartSky's network since October 2014. Yet Gogo spent the next two years telling the industry that SmartSky's technology would not work. Then, in 2016, Gogo suddenly announced that it was going to offer a "Next-Gen" network.

62. According to Gogo, its "Next-Gen" network would provide a "greater than ten-fold increase in capacity and peak speed" compared to its current ATG network and would "enable rapid growth in passenger adoption."[42] As Gogo publicly acknowledged, successfully developing and launching this network before SmartSky was critical to Gogo's survival because its current technology wasn't cutting it:

> "If our next generation ATG fails to perform as expected or its commercial availability is significantly delayed as compared to the timelines for which we have contracted, our business, business prospects and results of operations may be materially adversely affected. In addition, our failure to timely deliver next generation ATG could have a material adverse effect on our ability to alleviate capacity constraints in our network."[43]

Lying

63. Gogo made at least three misrepresentations that together made the market believe that: (1) Gogo had a *4G network* on the market five years before SmartSky launched the SmartSky Network; (2) Gogo was releasing a *5G network*; and (3) Gogo's forthcoming 5G network was *just around the corner*.

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[40] *Gogo Announces Its Next Generation Ground Network to Support In-flight Connectivity in North America* (Sept. 28, 2016), https://ir.gogoair.com/node/8076/pdf.

[41] Sascha Segan, *Here's What Gogo Has Planned for In-Flight Wi-Fi*, PC Mag, (Sept. 30, 2016), https://www.pcmag.com/news/heres-what-gogo-has-planned-for-in-flight-wi-fi.

[42] Gogo 2016 10-K, at 7.

[43] *Id*.

64. None of that was true.

65. What Gogo markets as "Gogo Biz 4G" isn't actually 4G technology, it's 3G technology based on the 3G standard.

66. "Gogo 5G," which Gogo markets as "true" "end-to-end" 5G, isn't. "Gogo 5G" is sometimes 3G, sometimes 5G.

67. And Gogo's "5G" network isn't just around the corner and it never was.

68. Gogo used this web of lies to make the market believe that Gogo was always two technological steps ahead of SmartSky when, in reality, it was—and still is—at least one leap behind.

69. Gogo is still making these misrepresentations today.

"Gogo Biz 4G" isn't 4G

70. Gogo started telling the first big lie around October 2015, while interest in the SmartSky Network was building but before SmartSky was actually installing its systems.[44]

71. To prevent the market from realizing that the SmartSky Network was far superior to Gogo's 3G network (Gogo's highest-performing ATG network at the time), Gogo started calling its 3G network "Gogo Biz 4G."

72. Despite its name, "Gogo Biz 4G" is just a modified version of Gogo's 3G technologies, using the same ground network and playing off of Gogo's previous "ATG-4" network that it launched in 2012.[45] Technically speaking, Gogo Biz 4G uses 3G EVDO Rev-B, distinguishing it from Gogo Biz which uses 3G EVDO Rev-A.

73. Gogo Biz 4G is *not* 4G, or even based on 4G standards.

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[44] *See Press Release: Gogo Announces 4G Connectivity Solution for Business Aircraft* (Oct. 14, 2015), https://ir.gogoair.com/node/7771/pdf.

[45] *Gogo to Bring Its ATG-4 In-Flight Connectivity Technology to Business Aviation*, (Feb. 4, 2015), https://ir.gogoair.com/node/7606/pdf.

74. This fact has been publicly recognized by industry experts.

75. Moreover, Gogo describes its "4G" network as a 3G network to the FCC. For example, in its April 8, 2024 status update to the FCC, Gogo describes its "existing EVDO network operations."[46] An EVDO network is a 3G network, as Gogo has publicly explained.[47]

76. Gogo has also admitted that its "4G" network is a 3G network to the SEC. For example, in a 2013 SEC filing, Gogo wrote:

> "Currently, we use EvDO Rev B and EvDO Rev A (Evolution-Data Only), the current CDMA-based 3G protocol, to transmit information over our 3 MHz of spectrum. . . . Our first generation ATG network (EvDO Rev A and single modem on aircraft) offers peak data rates of 3.1 Mbps on the ground-to-air direction, per sector, and 1.8 Mbps on the air-to-ground direction, per sector and aircraft. In 2012, we launched the next generation of our ATG solution, ATG-4, which uses EvDO Rev B, directional antennas and dual modems on an aircraft."[48]

77. Gogo's misrepresentations about 4G robbed SmartSky of one of its primary selling points. When Gogo first started falsely describing its network as "4G," SmartSky's technological advantages over Gogo were most easily summarized by explaining that Gogo's network was based on 3G technologies and the SmartSky Network was based on 4G LTE technologies (and later 5G). Unconnected business aviation aircraft owners were particularly receptive to this selling point because many of them had chosen not to use ATG in the past due to the technology's historical poor performance (i.e., the fact that Gogo—the only ATG provider in the past—had not gotten

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[46] *See SCRP Status Update*, File No. SC-SU0002550, (Apr. 8, 2024), https://www.fcc.gov/sites/default/files/gogo-business-aviation-0001134.pdf (last accessed December 2, 2024).

[47] *See e.g.*, *Gogo Business Aviation LLC Petition for Rulemaking*, WT Docket No. 21-282 (filed July 21, 2022), https://www.fcc.gov/ecfs/document/10722724123897/1; *see also* Letter from Counsel to Gogo Business Aviation, LLC to Marlene H. Dortch, Secretary of Federal Communications Commission (July 21, 2022), https://www.fcc.gov/ecfs/document/10722724123897/1 (last accessed Dec. 2, 2024).

[48] Gogo Inc. Amendment 10 to Form S-1 p. 127 (June 7, 2013), https://content.edgar-online.com/ExternalLink/EDGAR/0001193125-13-251036.html?hash=8fd14ba59547860a08ca51a90b0cddd27029705749af3f673439c81a8db9500d&dest=d267959dex1036_htm#d267959dex1036_htm.

past 3G). Thus, SmartSky's booth at the National Business Aviation Association conference (NBAA)—the largest industry conference for business aviation in the world—proudly displayed "4G LTE" in font larger than even SmartSky's name to help convey the technology underpinning its new network.

78. Gogo's misrepresentations let it claim 4G first. Upon information and belief, Gogo made these misrepresentations specifically intending to deceive the market into believing that "Gogo Biz 4G" was technologically equal to SmartSky's forthcoming network. As a direct result, SmartSky lost out on sales it would have otherwise made and, in turn, Gogo maintained its monopoly.

79. And, as another direct result of Gogo's 4G lie, SmartSky's salespeople had to spend considerable time trying to explain to potential purchasers that "Gogo Biz 4G" was not technologically comparable to the SmartSky Network from a performance perspective. Untangling that web of lies took extensive time and money and, in the end, was still largely unsuccessful.

"Gogo 5G" isn't 5G

80. Gogo started telling its second big lie in 2016. While its original misrepresentation told the market Gogo currently had technology *equal* to SmartSky's, its second told the market that Gogo's future technology would be *better*.

81. In 2016, Gogo started promising it would bring a new network, "Gogo Next-Gen."[49] Since Gogo was still in the process of bringing "Gogo Biz 4G" online at this time (read, "Gogo Biz Fourth Generation"), calling its forthcoming unlicensed band network "Next-Gen" was a not-so-subtle attempt at implying that "Next-Gen" was 5G.

82. Then, in May 2019, Gogo abandoned all semblance of subtleties and renamed its forthcoming unlicensed band network "Gogo 5G."[50] "Gogo 5G," like its predecessor "Next-Gen", copied SmartSky's technologies, including beamforming in the unlicensed spectrum.

83. But "Gogo 5G" isn't 5G.

84. Instead, "Gogo 5G" is only designed to *sometimes* operate as a 5G technology-based network (when travelling in low traffic areas) and operate on Gogo's self-described "antiquated" 3G network everywhere else.[51]

85. And yet, not only did Gogo misleadingly name the network "Gogo 5G," but Gogo went even further by claiming that Gogo 5G "meets all 3GPP's 5G standards," and is "a complete, end-to-end 5G experience that meets every standard."[52]

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[49] *See Gogo Announces Its Next Generation Ground Network to Support In-Flight Connectivity in North America*, (Sept. 28, 2016), https://gogoair.mediaroom.com/2016-09-28-Gogo-Announces-Its-Next-Generation-Ground-Network-to-Support-In-flight-Connectivity-in-North-America.

[50] *See Gogo to Launch 5G Network in 2021*, (May 29, 2019), https://gogoair.mediaroom.com/2019-05-29-Gogo-to-launch-5G-network-in-2021.

[51] Gogo eBook, p. 20; *Gogo's LTE Network Transition: What You Need to Know*, https://www.gogoair.com/gogo-network-migration/ (last accessed Dec. 3, 2024).

[52] *See Gogo 5G*, https://www.gogoair.com/gogo-5g/ (last accessed Dec. 1, 2024).

86. 3GPP (the Third Generation Partnership Project) is an international body that establishes standards for wireless technologies.[53] Each time there is a revolution in wireless cellular technologies, 3GPP defines it as a "generation"—e.g., "3G" refers to the third generation

[53] *See generally About 3GPP*, https://www.3gpp.org/about-us (last accessed Dec. 1, 2024).

of wireless technologies. Each official publication of new industry standards issued by 3GPP is called a "release."[54] There are typically multiple releases for each generation.

87. It is either impossible or next to impossible for ATG technology to "meet all 3GPP 5G Standards." But either way, Gogo 5G does not "meet all 3GPP's mobile broadband standards."

88. Gogo has also repeatedly said that its network is "true 5G", repeating the false phrase four times on just one page of its eBook.[55]

True 5G or pretend 5G?

Enabling a true 5G experience requires that all components within the network are 5G capable. Additionally, the onboard equipment has to be 5G compatible.

True 5G technology is a clean break from today's networks. 3G, 4G, and 4G LTE will remain relevant, and carriers (both on the ground and in the air) will tweak these services over time. But they are not 5G and will eventually yield to it.

Gogo's network will utilize the same 5G technology systems, components, and infrastructure as the wireless carriers will use to deploy their true 5G networks on the ground — with a few key benefits, as mentioned earlier, that are only available to airborne 5G.

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[54] *See Releases*, https://www.3gpp.org/specifications-technologies/releases (last accessed Dec. 1, 2024).
[55] *See* Gogo eBook, p. 20.

89. Gogo has occasionally admitted to its dishonesty, but only in situations where it knew it would likely be caught and where its target market was unlikely to hear. For example, in January 2022—about five years after releasing "Gogo Biz 4G"—Gogo wrote to the FCC, describing its plan to upgrade its network (singular) to 4G, admitting that "Gogo Biz 4G" uses 3G technologies, and explaining that it was not possible for Gogo to operate a 3G and 4G network simultaneously (unlike it was claiming at the time):

> - "Gogo is ***planning an upgrade to 4G*** due to technology obsolescence of 3G."
> - "Gogo ***is designing*** a 4G ATG solution."
> - "[Gogo's] Network has been in commercial operation since 2008."
> - "[Gogo's] Network utilizes 3G EvDO air interface in dedicated ATG licensed 800 MHz band."
> - "4G system cannot operate at the same time as the 3G system . . . 4G uses the same spectrum as 3G, so turning on a 4G transmitter while 3G is operational would cause service interruptions to Gogo's customers."[56]

90. As another example, Gogo also publicly admitted that "Gogo Biz 4G" is a 3G network in a July 2022 letter to the FCC. In this letter, Gogo explicitly described its plan to upgrade its network at that time ("Gogo Biz 4G") ***from*** 3G ***to*** 4G:

> "Gogo BA determined that transitioning ***from its legacy 3G*** Code Division Multiple Access Evolution-Data Optimized (CDMA EV-DO) network ***to a 4G Long Term Evolution (LTE) network*** using Orthogonal Frequency Division Multiplex (OFDM) technology would enhance Gogo BA's offerings. The new technology, based on the 3rd Generation Partnership Project (3GPP) global standard, will

[56] *See* Letter from Counsel to Gogo Business Aviation, LLC to Marlene H. Dortch, Secretary of Federal Communications Commission (January 20, 2022) (emphasis added), https://www.fcc.gov/ecfs/document/1012110440740/1 (last accessed Dec. 2, 2024).

> allow Gogo BA to improve its nationwide broadband network's throughput, coverage, and reliability. . . ."[57]

91. These communications reveal a theme. When Gogo describes Gogo Biz 4G to the public, it's a 4G network. And when Gogo describes Gogo 5G to the public, it's a 5G network. But when Gogo describes its technologies to the FCC—which, because the FCC understands the technological standards for 3G, 4G, and 5G, would know "Gogo Biz 4G" is really 3G and "Gogo 5G" isn't really 5G—Gogo is careful to tell the truth.

92. Gogo knows what it's doing. Gogo knows that it has misleadingly advertised "Gogo Biz 4G" and "Gogo 5G," but nonetheless intentionally sought to gain an unfair advantage against SmartSky and further entrench its monopoly power by deceiving customers into believing that "Gogo Biz 4G" and "Gogo 5G" are something that they are not.

93. And the market believed it.

94. Gogo's misrepresentations thus induced new end-users to purchase Gogo ATG systems instead of SmartSky's and allowed Gogo to retain current users in the face of competition from SmartSky's superior technology. From the time Gogo first started making these misrepresentations until today, Gogo has sold thousands of its falsely-advertised ATG systems.[58]

95. Gogo's 4G and 5G misrepresentations decreased SmartSky's sales and discouraged investment into SmartSky at critical, make-or-break points in SmartSky's business cycle.

96. On the sales front, Gogo's 4G and 5G misrepresentations gutted SmartSky's opportunity to reap the innovative benefits it sowed by being the first to develop a next-generation ATG network. By falsely communicating that Gogo had a "4G" network today and would have a

[57] *See* Letter from Counsel to Gogo Business Aviation, LLC to Marlene H. Dortch, Secretary of Federal Communications Commission (July 21, 2022), https://www.fcc.gov/ecfs/document/10722724123897/1 (last accessed Dec. 2, 2024) (emphasis added).

[58] Gogo, *Q3 2023 Earnings Call*, Refinitiv StreetEvents, Nov. 7, 2023, at 4 ("We grew total [AVANCE] units online in the quarter, 16% over the prior year to 4,379 aircraft, representing 62% of our ATG install base.").

"5G" network tomorrow, Gogo directly targeted SmartSky's primary competitive advantage and one of the few conceivable competitive advantages that a new entrant could have used to dethrone Gogo's monopoly—innovative, superior technologies.

97. Moreover, Gogo deceived both current Gogo users and the owners of unconnected aircraft to wait around for Gogo "5G" instead of getting SmartSky.

98. On the investor front, Gogo's misrepresentations robbed SmartSky of its unique, patent-protected, and highly disruptive edge. To investors in any market, a new entrant must have a significant competitive advantage over a monopolist to have a chance at dethroning them in the best of circumstances. This rule is all the more true in the ATG market.

99. Gogo's misrepresentations took the stone out of SmartSky's sling. While SmartSky was in reality (and in perception before Gogo's misrepresentations) a disruptive innovator bringing a breakthrough technology to market, Gogo's misrepresentations made investors believe that SmartSky was trying to takedown a monopolist by selling a technologically inferior product. Unsurprisingly, when Gogo's 4G and 5G misrepresentations were accepted by the market, SmartSky's investor funding soon ran dry.

100. Upon information and belief, the harm Gogo's 4G and 5G misrepresentations caused SmartSky was by Gogo's intentional design. Gogo intended for its false description of its (supposed) forthcoming network to deceive the market into believing that Gogo "5G" ATG is superior to SmartSky ATG. And Gogo did this with the specific intent of maintaining its monopoly power. Gogo's lies were just more arrows in its quiver.

Vaporware

101. It wasn't enough for Gogo to falsely promise that "Gogo 5G" was going to be superior to SmartSky's Network. Gogo wanted to make the market believe that Gogo's "5G" would be here *before* SmartSky.

102. Soon after announcing that it would launch its "Next-Gen" network by 2018,[59] it became clear to Gogo that it was not going to meet that deadline. This created a massive problem for Gogo because the stickiness of ATG customers meant that if SmartSky brought a clearly a superior product to market before Gogo, it would lock in customers for the next twenty or so years.

103. Knowing that SmartSky was going to beat it to market and desperate to prevent SmartSky from capturing its market share, Gogo launched a massive misinformation campaign to convince the market (including MROs/dealers, aircraft manufacturers, end-users, and investors) that Gogo's "Next-Generation" network was always just around the corner.[60] But each time its fake launch date came near, Gogo delayed it just a little while longer. This pattern went on for years and continues today.

104. The result was confusion. Despite SmartSky releasing its objectively superior and immediately available 4G LTE-based technology *years* before Gogo's comparable (still not fully available) "5G" system, Gogo's scheme created a false barrier to entry that worked as Gogo intended. With an incumbent firm deeply tied to all levels of the market promising it would soon

[59] Gogo reconfirmed this launch date several times afterwards, including in May 2017 when Gogo's CEO claimed "[s]o our next-gen ATG, it will be a commercial launch in 2018. What gives us confidence is we've been working on the technologies that underlie this for a decade. This isn't a new effort for us, we announced it last year. And so far we're hitting all our milestones against that effort, ***right on time and right on budget***." Gogo, *Q1 2018 Gogo Inc. Earnings Call* Thomson Reuters StreetEvents, May 4, 2017, at 7 (emphasis added).

[60] *See Gogo Business Aviation's 4G Service Takes Flight*, (Aug. 24, 2017), https://gogoair.mediaroom.com/2017-08-24-Gogo-Business-Aviations-4G-Service-Takes-Flight ("Gogo AVANCE L5 is future-ready, providing an upgrade path to Gogo's Next-Gen network, scheduled to launch in 2018.").

release a 5G product, end-users, MROs/dealers, and Fleet Operators chose to wait for the monopolist's promised future solution rather than adopt the new entrant's working technology.

105. The name for this strategy of using false promises of soon-to-be released improved future products to discourage or prevent consumers from purchasing a rival's superior products is "Vaporware."[61]

106. Vaporware was especially effective for Gogo because new entrants into this market must have a serious competitive advantage to get their foot in the door. SmartSky had that advantage over Gogo in the form of its vastly superior technology at a comparable price.

107. Gogo's Vaporware robbed SmartSky of that advantage.

108. Gogo repeated the same pattern multiple times—announcing not-too-distant launch dates for its "next-generation" networks, falsely repeating and reinforcing those promises, but delaying the launch dates at the last possible second.

109. First, in 2016, Gogo announced its "Next-Gen" network would be available by 2018.[62] Gogo spent the next two years expressing nothing but confidence it would meet that launch date.[63] But when 2018 came around, Gogo announced that launch was indefinitely delayed,[64]

[61] *See, e.g.*, *Vaporware: Imaginary High-Tech Products and Real Antitrust Liability in a Post-Chicago World*, 57 OHIO ST. L.J. 1163 (1996).

[62] *Gogo Announces Its Next Generation Ground Network to Support In-flight Connectivity in North America* (Sep. 28, 2016), https://ir.gogoair.com/node/8076/pdf.

[63] Gogo, *Q2 2017 Gogo Inc. Earnings Call*, Thomson Reuters StreetEvents, Aug. 7, 2017, at 10 ("It's staying right on schedule, and it's performing great."); Gogo, *Q3 2017 Gogo Inc. Earnings Call*, Thomson Reuters StreetEvents, Nov. 2, 2017, at 3, 6 ("By this time next year . . . our next-gen ATG network will be commercially available. . . . [O]ur next-generation ATG development . . . remains on track for commercial availability in 2018."); Q4 2017 Earnings Call, at 3 ("We are also turbocharging our ATG network in 2018. . . . and is on track for nationwide coverage and commercial availability later this year.").

[64] Gogo, *Q1 2018 Gogo Inc. Earnings Call*, Thomson Reuters StreetEvents, May 4, 2018, at 4 ("[U]ntil we understand how we're going to resolve the ZTE issue, we can't really project what the impact is on the Next Gen project. So current course of speed was to have that commercially available by the end of this year. But given the Commerce Department order, we're trying to sort out the impact of that.").

supposedly because one of Gogo's Chinese suppliers and development partners (ZTE) was banned by the United States government over national and cybersecurity concerns.[65]

110. From the early years of Gogo's involvement with ZTE (if not from the beginning), Gogo knew or should have known that ZTE's involvement in Gogo's "Next-Gen" network was going to prevent Gogo from meeting its 2018 launch date. Gogo knew or should have known since March 2017 that ZTE had pleaded guilty to three felony counts and paid nearly $900 million in fines for selling telecommunications equipment to Iranian companies and lying about it to the United States government.[66] ZTE had been under investigation for similar activities since March 2012.[67]

111. In fact, after Gogo announced the ZTE delay, Gogo's CEO publicly admitted that "***we'd be foolish not to understand the risks in having a Chinese telco as a partner now, sadly***."[68]

112. And yet, Gogo waited until February 2019—almost a *year* after the delay—to disclose to investors that their reliance on ZTE could prevent it from meeting its "Next-Gen" launch dates.[69]

113. Then, later in 2019, Gogo announced its "new" new-network—which was fundamentally the same technology as its "Next-Gen" network just with a "Gogo 5G" label slapped on it—and announced a new launch date in 2021.[70]

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[65] Gogo Inc., Annual Report (Form 10-K) (Feb. 21, 2019), at 2 (hereinafter "Gogo 2018 10-K"); Gogo, *Q4 2018 Gogo Inc. Earnings Call*, Thomson Reuters, Feb. 21, 2019, at 8, 13.

[66] *See Settlement Agreement between the U.S. Department of the Treasury's Office of Foreign Assets Control and Zhongxing Telecommunications Equipment Corporation* (Mar. 7, 2017), https://ofac.treasury.gov/recent-actions/20170307.

[67] *See Chart: Timeline of ZTE Sanctions* (Apr. 18, 2018), https://www.caixinglobal.com/2018-04-18/chart-timeline-of-zte-sanctions-101236224.html.

[68] *See* Gogo, *Q1 2019 Gogo Inc. Earnings Call*, Thomson Reuters, May 9, 2019, at 14.

[69] *See* Gogo, *Q4 2018 Gogo Inc. Earnings Call*, at 13 ("[W]e we are cognizant, obviously, of the government's concern about ZTE as a security concern. . . . So at this point, we are waiting to see what happens with ZTE but teeing up other approaches.").

[70] *See* Gogo, *Q2 2019 Gogo Inc. Earnings Call*, Thomson Reuters StreetEvents, Aug. 8, 2019, at 3, 14.

114. Just like last time, Gogo never showed doubt about meeting its 2021 deadline. But when 2021 came around, Gogo announced a delay until the second half of 2022.[71]

115. Throughout 2021 and into 2022, Gogo publicly expressed confidence in its 2022 deadline. In early 2022, Gogo reported: "In terms of 5G milestones, we've now passed all technical hurdles and ***are into the deployment and commercial launch phase of the 5G program***."[72]

116. Gogo, of course, had not "passed all technical hurdles," nor was it "into the deployment and commercial launch phase of the 5G program." So when the supposed release date of second-half 2022 came around, Gogo announced another delay until mid-2023.[73]

117. Then, in November 2022, Gogo delayed the launch date again, from mid-2023 until Q4 2023.[74]

118. Throughout the remainder of 2022 and into 2023, Gogo expressed confidence in its Q4 2023 launch date. In Q1 2023, Gogo reported:

> "The chip needed for Gogo 5G recently passed a critical design review and is now in fabrication with delivery expected midyear. . . . 5G service is expected to launch commercially in the fourth quarter of 2023. . . . There's always the ***black swan possibility that something goes crazy at Samsung again*** or whatever. But with the amount of attention, Samsung, Airspan and GCT, and we have all paid to this chip at this point [, ***it] would be shocking if there was a problem with it***. So we're quite confident we'll be delivering in Q4."[75]

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[71] Gogo, *Q4 2020 Gogo Inc. Earnings Call*, Refinitiv StreetEvents, Mar. 11, 2021, at 4 ("[O]ur schedule has slipped, primarily because of a supply chain delay for one particular microchip, and we now expect to ***deploy the network in 2022 instead of 2021***.") (emphasis added).

[72] Gogo, *Q4 2021 Gogo Inc. Earnings Call*, Refinitiv Street Events, Mar. 3, 2022, at 5.

[73] Gogo, *Q2 2022 Gogo Inc. Earnings Call*, Refinitiv StreetEvents, Aug. 5, 2022, at 4 ("One recent unfortunate development. The manufacturer of our 5G chip has just notified us of a new issue in late-stage testing, which could delay ramping up to full production volume until mid-2023.").

[74] *See* Gogo, *Q3 2022 Gogo Inc. Earnings Call*, Refinitiv StreetEvents, Nov. 3, 2022, at 4 ("As I'm sure you're all aware, we received some disappointing news immediately before our Q2 earnings call. Our 5G supplier Airspan, informed us that there was a flaw in Samsung's fabrication of our 5G chip that locked the chip in test mode. We have just received final commitments from Airspan and their chip supplier that Samsung will need to respin the entire chip. Airspan will now receive the chip in Q2 next year. We will test fly in Q3, and that should put us solidly on track for commercial launch in Q4.").

[75] Gogo, *Q1 2023 Gogo Inc. Earnings Call*, Refinitiv StreetEvents, May 3, 2023, at 14.

119. But when that launch date came around, Gogo reported that another delay would push back its release date almost another year until Q3 2024.[76]

120. Q3 2024 looked good to Gogo too. In Q3 2023, Gogo again expressed confidence in meeting its deadline, reporting "we're confident we'll hit that time frame."[77]

121. But once again, in Q1 2024, Gogo pushed back the release date until 2025.[78]

122. In total, Gogo has missed at least ***eight*** projected launch dates for a ***total delay of over 7 years and counting***.

123. The entire time, Gogo knew or should have known that these launch dates were unrealistic, if only just because of the information it received from its chip suppliers.

124. Today, Gogo still has not released its "next-generation" 5G system.[79] On its Q3 2024 earnings call, Gogo announced a launch date "late in the second quarter of 2025."[80] But given Gogo's extensive history of missed deadlines, independent analysts and industry insiders are now doubtful:

a. "Gogo dealers are openly wondering if Gogo's 5G upgrade will ever come."

b. A major Gogo dealer executive reported in an interview: "They're saying 2025, I think that's ambitious. . . . I think it's more realistic to assume [installation in] Q1, Q2 2026."[81]

125. Simultaneously, Gogo supercharged its Vaporware strategy by releasing its AVANCE ATG systems at the end of 2017. As advertised by Gogo itself, a primary benefit of

[76] *See* Gogo, *Q3 2023 Earnings Call*, Refinitiv StreetEvents, Nov. 7, 2023, at 7 (noting the "expected launch of Gogo 5G in Q3 2024").

[77] *Id.* at 5.

[78] *See* Gogo, *Q1 2024 Gogo Inc. Earnings Call*, Refinitiv StreetEvents, May 7, 2024, at 5 ("[W]e currently expect the launch of Gogo 5G to occur a few months later than the previously stated fourth quarter of 2024 . . . .").

[79] Gogo built hundreds of "5G" base stations, and sold hundreds of its "5G" systems, but has not yet activated that "5G" network for customer use.

[80] Gogo, *Q3 2024 Gogo Inc. Earnings Call*, Refinitiv StreetEvents, Nov. 5, 2024, at 6.

[81] *See Gogo: Coming Down to Earth* (Aug. 6, 2024), https://www.bleeckerstreetresearch.com/research/gogo.

AVANCE was the ease of later upgrading them to Gogo "5G."[82] In other words, Gogo designed and sold a product with the objective of keeping SmartSky off planes.

126. Gogo used these AVANCE systems as a way to stop its current Gogo users from seriously considering SmartSky. Among other ways of accomplishing that goal, Gogo offered its current users steep discounts to "upgrade" to AVANCE and limited those discounts to only a brief period to create a false sense of urgency.[83] And then each year, Gogo would reinstate the discount with revised deadlines for a renewed sense of urgency. Since buyers, at most, only look at upgrading every several years, they would be unaware that these discounts were offered before.

127. Gogo's Vaporware and 4G and 5G misrepresentations were a goldmine for Gogo and a steel curtain to SmartSky. Gogo sold about 4,400 ATG systems during the predatory period, out of the about 8,000 total number equipped with ATG in the United States. That is 4,400 aircraft that, due to stickiness, SmartSky would not have an opportunity to recapture for the next twenty years.[84]

128. Gogo's supercharged Vaporware and 4G and 5G lies also affected SmartSky's ability to attract capital investment in a similar way. The major upside of SmartSky as an investment depended primarily on it beating Gogo to market with a next-generation ATG network. But if the market even thought that Gogo was going to make it a close race, SmartSky lost much of that appeal, both to customers and investors.

129. Similarly, Gogo's Vaporware and 4G and 5G lies hindered SmartSky's ability to get its ATG systems certified by the FAA for different models of aircraft. When SmartSky first

[82] *See* Q3 2021 Earnings Call, at 5 (explaining that "[a] key selling point for the AVANCE L5 platform is that the upgrade path to our Gogo 5G network is much simpler.").

[83] *AVANCE Customer Loyalty (First to Fly) Promo Form*, https://www.gogoair.com/first-to-fly-promo-form/ (last accessed Dec. 2, 2024).

[84] Q3 2024 Earnings Call, at 4 ("We grew total advanced units online in the quarter, 16% over the prior year to 4,379 aircraft, representing 62% of our ATG install base.").

entered the market, it was customary for MROs to fund and perform the FAA certification process, as they could then earn license fee revenue on each installation thereafter. This typically involved the ATG company giving an MRO a free ATG system, the MRO funding and doing the engineering work and installing it onto the aircraft, and then performing the testing needed to get FAA approval. And although MROs initially told SmartSky that they would be paying for SmartSky's FAA certifications too, the MROs later withdrew their offers after Gogo announced Gogo "5G." For example, Duncan Aviation, the largest MRO in the U.S., was initially excited about SmartSky's product and eager to fund SmartSky's FAA certifications on multiple aircraft models, but when Gogo announced its own 5G system that was soon to arrive, Duncan slammed the door on SmartSky.

130. Other MROs did the same thing to SmartSky as Duncan after Gogo falsely announced its 5G product would arrive in a short time.

131. As a result of these MROs effectively refusing to work with SmartSky to certify its ATG systems, SmartSky was forced to use third-party engineering firms. Using these firms was both more costly and took longer than if SmartSky had been able to use MROs.

132. SmartSky's difficulties getting FAA certifications had a significant negative effect on its ability to make sales. In general, customers are less likely to purchase an ATG system when it is not yet FAA-certified for their aircraft with an STC.

133. Because it was built on misinformation, Gogo's Vaporware Strategy had no procompetitive benefits.

Fear, Uncertainty, and Doubt

134. Gogo also engaged in a systematic campaign to create fear, uncertainty, and doubt about SmartSky, both with regard to SmartSky the company and SmartSky's technology.

135. For example, immediately after Gogo first learned that SmartSky was going to enter the market around 2014 and while rumors were circulating about SmartSky's use of the unlicensed spectrum, Gogo repeatedly and publicly said that unlicensed spectrum could not be used for an ATG network.[85]

136. Gogo also used misinformation to convince the market that SmartSky lacked the investor funding to establish and operate an ATG network. Gogo's misinformation about SmartSky's viability eventually became a self-fulfilling prophecy.

137. Gogo's other public, intentionally false statements included:

- Gogo's claim in October 2022 that it had the only active 5G network in the U.S. when, as explained above, Gogo's "forthcoming" "5G" network is not true 5G, and—while Gogo has been selling its "5G" systems—"Gogo 5G" is still not active today. SmartSky's Network *was* active.

- Gogo's claim that SmartSky's *peak* data speeds were 2 Mbps, when SmartSky's peak data speeds were over 20 Mbps.

- Gogo's claim that SmartSky's network had six MHz of bandwidth when it was sixty.

138. Because it was built on misinformation, Gogo's fear, uncertainty, and doubt campaign had no procompetitive benefits.

Predatory Bundling

139. Gogo cheated too.

140. Among other ways, Gogo cheated with a predatory bundling scheme. This scheme involved selling multiple products and service packages at steep discounts. Further, upon information and belief, those discounts brought Gogo's pricing well below Gogo's cost—an

[85] *See e.g.*, Gogo, *Q3 2014 Gogo Inc. Earnings Call*, Thomson Reuters Street Events, Nov. 10, 2014, at 9 ("I would point out that SmartSky is using unlicensed spectrum. In our view that is an extraordinarily risky way if that is your sole spectrum position is unlicensed it could perhaps be a supplemental solution. But as your base solution unlicensed spectrum is very risky; you cannot guarantee that spectrum will stay clean for any period of time.").

untenable long-term strategy. But Gogo knew that new entrants like SmartSky didn't have the war chests needed to keep-up with Gogo's scheme[86] and that it could recoup its losses by reaping monopolistic profits after eliminating all of its competitors.

141. Gogo's bundles all invoked promises of future, improved technologies bundled with Gogo's current, inferior technologies. Gogo offered at least two of these bundles, each tied to a sale of its falsely-named "Gogo Biz 4G" 3G systems:

a. "Gogo Biz 4G" 3G system + the promise of a free future upgrade to the "Gogo 5G" system; and

b. "Gogo Biz 4G" 3G system + the promise of a free future upgrade to the "Gogo 5G" system + the promise of a free future upgrade to Gogo's LEO (low earth orbit satellite system), Galileo[87]

142. Gogo discounted these bundles in at least four ways.

a. First, Gogo gave $25,000 to $50,000 cash rebates to any end user that bought a Gogo ATG system.[88]

b. Second, Gogo decreased both the wholesale and suggested retail prices for its "4G" + "5G" bundles by about 40%.[89]

c. Third, Gogo sold its already-discounted "4G" systems bundled with free "5G provisioning kits" and free future upgrades to "Gogo 5G". Those kits included not only the equipment needed to install the "4G" system, but nearly all of the equipment needed to upgrade to the "5G" system.[90] On top of this bundled discount, Gogo

[86] Gogo knew this because SmartSky was a new entrant which, as Gogo knew, heavily relied on equipment revenues to stay afloat. *See* Q4 2014 Earnings Call, at 4 ("Turning now to BA, total revenue grew 7%, to over $39 million, and service revenue grew 35%, to just over $20 million for the quarter. I want to highlight a significant milestone for you in these numbers. This was the first time BA service revenue exceeded equipment revenue. Why is this an important milestone, you might ask. Because the service revenue stream has a higher margin than the equipment revenue stream. As we continue to add ATG units online, which drives service revenue growth, a growing proportion of service revenue will have a positive impact on overall margins for BA.").

[87] *See Gogo AVANCE Promotions*, https://www.gogoair.com/promotions (last accessed Dec. 2, 2024); *see also Gogo Galileo*, https://www.gogoair.com/galileo/ (last accessed Dec. 15, 2024).

[88] *Id*.

[89] The custom dealer markdown in the industry is roughly 25 percent from MSRP. Therefore, a 40% decrease in Gogo's MSRP would likewise correspond with a 40 percent decrease in wholesale prices.

[90] *The Gogo 5G Network is Nationwide* (Oct. 17, 2022), https://ir.gogoair.com/static-files/784b233d-8f1c-4765-a0af-7b1681727329 ("Customers who want Gogo 5G service can install the AVANCE L5 system with full 5G provisions (including the MB13 antennas) today, and operate on Gogo's 4G network until the X3 LRU [Line Replaceable Unit] is available. Once the X3 is ready, it can be installed quickly and 5G service can begin immediately, saving downtime and expenses.").

also began offering an additional $30,000 rebate for customers that purchased and installed the L5 system and MB13 antenna pair before "Gogo 5G" was launched.[91]

d. Fourth, Gogo offered their "SmartShield" discounting package that included a $10,000 installation rebate, a $15,000 service credit, and additional miscellaneous product and service discounts.[92]

143. Before SmartSky threatened Gogo's monopoly, Gogo's suggested retail prices (MSRPs) for the "4G" and "5G" systems were about $140,000 and $220,000, respectively.[93] Once Gogo felt threatened, the MSRP for the "4G" + "5G" systems bundled together dropped to $140,000.[94] But the MSRPs don't tell the whole tale—end users received rebates of up to $80,000, dropping their effective price for the "4G" and "5G" systems together to $60,000.

144. Upon information and belief, Gogo's prices were below its costs. From 2021 (when SmartSky entered the market and threatened Gogo's monopoly) to mid-2024 (when SmartSky left the field and ended its threat), Gogo's average effective equipment prices were lower than its average variable costs of production.

145. Moreover, and upon information and belief, during the same period, Gogo's average combined equipment and services prices were lower than its average variable costs of production for some deals or with some purchasers.

146. Boosted by Gogo's Vaporware and 4G and 5G lies, the market bought Gogo's discounted bundles in bulk. Upon information and belief, those sales represented millions in losses to Gogo. But Gogo didn't mind.

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[91] *See AVANCE Customer Loyalty (First to Fly) Promo Form*, https://www.gogoair.com/first-to-fly-promo-form/ (last accessed Dec. 2, 2024).

[92] *See Gogo SmartShield*, https://www.gogoair.com/smartshield/ (last accessed Dec. 2, 2024).

[93] *What You Need to Know About the Gogo 5G Network, CLA Aero* (Oct. 18, 2023), https://cla.aero/what-you-need-to-know-about-the-gogo-5g-network/.

[94] *See e.g.*, *id.*; *see also AVANCE LX5*, https://www.gogoair.com/avance/lx5/ (last accessed Dec. 2, 2024) *and AVANCE L5*, https://www.gogoair.com/avance/l5/ (last accessed Dec. 2, 2024).

147. Gogo didn't mind because once SmartSky was driven from the market, Gogo could recoup its losses. Gogo knew it could dispatch SmartSky quickly by using its monopoly power, and it was right. From Gogo's own experience, it knew that SmartSky had to make equipment sales to stay afloat, either to survive off the revenue or to receive outside funding.[95] Thus, it knew that SmartSky couldn't discount its equipment to the extent Gogo could. And even though some consumers would buy SmartSky's now (due to Gogo's predatory bundling) more expensive equipment for the superior technology, Gogo eliminated SmartSky's technological advantage by promising free, just around the corner 5G upgrades. So by dropping its equipment prices below cost and at least promising to eliminate SmartSky's product superiority, Gogo was able to prevent SmartSky from getting a toehold in the market.

148. Gogo also knew that it could later raise prices without either losing subscribers or giving room for competitors to enter the market. This ability comes from a combination of sunk costs and stickiness, as well as the total lack of substitutes.

149. Nor is market entry a feasible safeguard against Gogo's recoupment. Gogo's own development of its "Next-Gen"/Gogo "5G" network has taken eight years so far and counting. A new entrant would need at least that long, and even were it able to take the field in half that time, Gogo would still have ample time to recoup its losses.

150. Moreover, this market has shown how difficult market penetration is for a new entrant. AT&T also tried and failed to enter the ATG market in 2014.[96]

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[95] *See* Q4 2014 Earnings Call, at 4 ("Turning now to BA, total revenue grew 7%, to over $39 million, and service revenue grew 35%, to just over $20 million for the quarter. I want to highlight a significant milestone for you in these numbers. This was the first time BA service revenue exceeded equipment revenue. Why is this an important milestone, you might ask. Because the service revenue stream has a higher margin than the equipment revenue stream. As we continue to add ATG units online, which drives service revenue growth, a growing proportion of service revenue will have a positive impact on overall margins for BA.").

[96] *See* David Goldman, *AT&T Says it is No Longer Working to Improve the Mostly Terrible Wi-Fi Service on Airplanes*, CNN Business (November 10, 2014), https://money.cnn.com/2014/11/10/technology/mobile/att-flight-wifi/index.html.

151. Upon information and belief, Gogo has already demonstrated its ability to recoup its losses by immediately increasing its prices for some customers immediately after Gogo's only competition (SmartSky) was no longer in business.

152. Upon information and belief, Gogo priced its equipment bundles below their costs of production and has a dangerous probability of recoupment. This violates Section 2 of the Sherman Act.

153. The anticompetitive harms from Gogo's predatory bundling scheme outweigh any procompetitive justifications Gogo might concoct in hindsight.

Gogo's Coordinated Refusal to Deal

154. Upon information and belief, Gogo also choked off the retail supply of SmartSky's ATG systems by pressuring its major MROs to avoid working with SmartSky, which ultimately prevented access for SmartSky to the intermediaries necessary to reach end-users.

155. Evidence of Gogo's illicit market pressure abounds.

156. First, none of the major MROs in the U.S. ever sold a SmartSky system.

157. Second, this behavior is nearly impossible to explain in the absence of unlawful pressure from Gogo. These MROs refused to sell SmartSky's systems despite specific consumer demands to purchase them, despite high demand over all for a next-gen ATG system, and despite the fact that SmartSky was the only firm with a next-generation ATG system currently available. Moreover, because no other major MROs offered to sell SmartSky's equipment, offering to do so would have likely been a profitable differentiation strategy for an MRO.

158. Third, the market structure predisposed MROs to the effect of Gogo's illicit market pressures. With the major MROs (Gogo's top sellers) having such large market shares and the

nature of the market as a whole, Gogo knew that it would not take long for its anticompetitive behavior and leverage over the MROs to achieve its purpose—ending SmartSky.

159. Fourth, upon information and belief, MROs engaged in behavior indicating that they were threatened or otherwise unlawfully influenced by Gogo into hurting SmartSky's chances at making sales.

160. Upon information and belief, Gogo went to extreme measures to enforce its leverage and illicit market pressures over the MROs. These measures included threatening to stop doing business with MROs after learning the MRO was planning to do business with SmartSky.

161. Upon information and belief, the MROs, threatened by Gogo's anticompetitive behavior and market pressures, generally refused to work with SmartSky to obtain STCs or would only do so when SmartSky paid them, contrary to how they acted for Gogo. To this point, Duncan Aviation has developed or is actively developing at least thirty STCs for "Gogo 5G."[97] All for a product that, to this day, has not been released.

162. Duncan only developed one for SmartSky.

163. All told, as a result of Gogo's illicit tactics, SmartSky was only ever able to certify 17 different aircraft models, covering only about 25% of the in-service aircraft in the U.S. By comparison, Gogo has STCs for nearly every model of BA aircraft in the U.S.

Gogo's Exclusive Dealing Agreements

164. Upon information and belief, anticipating SmartSky entering the market, Gogo entered into a series of exclusive or *de facto* exclusive dealing agreements with MROs, aircraft manufacturers, and Fleet Operators, foreclosing a substantial portion of the ATG market to SmartSky.

[97] *See Gogo and Duncan Aviation Collaborate to Expand 5G STC Portfolio,* (Aug. 1, 2024), https://www.gogoair.com/news/2024/08/gogo-and-duncan-collaborate-to-expand-5g-stc-portfolio.

165. Upon information and belief, to prevent SmartSky from tapping into the MRO market, Gogo entered into long-term exclusive or *de facto* exclusive dealing agreements with major MROs.[98]

166. Upon information and belief, these MRO agreements also had a secondary, insidious effect on SmartSky's market penetration. Because aircraft manufacturers do not sell ATG systems until they have a proven track record in the aftermarket, and MROs make the vast majority of the aftermarket sales, SmartSky's inability to sell to MROs also crippled SmartSky's ability to make sales to aircraft manufacturers.

167. Upon information and belief, to ensure that SmartSky wasn't selling its ATG systems to aircraft manufacturers, Gogo also entered into long-term exclusive or *de facto* exclusive dealing agreements with aircraft manufacturers.[99]

168. Upon information and belief, these agreements with aircraft manufacturers existed despite the fact that customers were specifically requesting aircraft manufacturers to install SmartSky's systems onto aircraft that customers had ordered.

169. The aircraft manufacturing market is highly concentrated. Therefore, an exclusive dealing agreement with any major business aviation aircraft manufacturer would substantially foreclose a competitor from a significant portion of the line-fitment side of the ATG equipment market.

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[98] *Gogo and Duncan Aviation Partner on Comprehensive 5G STC Portfolio*, Gogo Inc. (Oct. 26, 2023), https://ir.gogoair.com/news-releases/news-release-details/gogo-and-duncan-aviation-partner-comprehensive-5g-stc-portfolio; *see also StandardAero Prepares for Increased Gogo Avance Upgrade Demand, Establishes Slot Program for Gogo Installations*, StandardAero (Nov. 28, 2023), https://standardaero.com/standardaero-prepares-for-increased-gogo-avance-upgrade-demand-establishes-slot-program-for-gogo-installations/.

[99] *Gogo Avance L5 5G Provisions Now Offered for Dassault Falcon Jet*, Gogo Inc. (Nov. 30, 2023), https://ir.gogoair.com/news-releases/news-release-details/gogo-avance-l5-5g-provisions-now-offered-dassault-falcon-jet; *see also Gogo Avance L5 Certified for Full Complement of Gulfstream Airframes, Gogo Inc.* (Nov. 21, 2023), https://ir.gogoair.com/news-releases/news-release-details/gogo-avance-l5-certified-full-complement-gulfstream-airframes.

170. Upon information and belief, Gogo also entered into similar long-term exclusive or *de facto* exclusive dealing agreements with major Fleet Operators.

171. Gogo has widely publicized being the exclusive provider of ATG systems and ATG services to multiple fleets. In 2021, Gogo announced that "Jet Edge, the largest operator of super midsized and large cabin private jets," had agreed to purchase and install "Gogo 5G" for 50 of its aircraft.[100] In May 2023, Gogo announced that flyExclusive —a fleet operator with 90 aircraft at the time—was upgrading 40 of its aircraft to Gogo's "4G" systems.[101] And in February 2024, Gogo announced it had partnered with NetJets[102] to be the exclusive provider for ATG equipment and services across NetJets' 450 aircraft.

172. Gogo's exclusive and *de facto* exclusive dealing agreements with Fleet Operators had durations ranging from two to ten years.[103]

173. In the aggregate, Gogo's exclusive dealing agreements with Fleet Operators guaranteed that thousands of aircraft were equipped with Gogo's ATG systems. Because of the stickiness of ATG systems, these agreements effectively foreclosed competition for a considerable portion of the total ATG market for the next twenty or so years.

174. Upon information and belief, Gogo also entered into exclusive or *de facto* exclusive dealing agreements with individual jet owners. Upon information and belief, these agreements

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[100] *Jet Edge Signs as Gogo 5G Launch Customer* (Oct. 13, 2021), https://www.gogoair.com/about/news-events/news-releases/2021/10/jet-edge-signs-as-gogo-5g-launch-customer/.

[101] *flyExclusive Expands Fleet Commitment of Gogo AVANCE* (May 31, 2023), https://www.gogoair.com/news/2023/05/flyexclusive-expands-fleet-commitment-of-gogo-avance/.

[102] *NetJets Signs New Connectivity Agreement Extending 20-Year Relationship with Gogo* (Feb. 7, 2024), https://www.gogoair.com/news/2024/02/netjets-signs-new-agreement-with-gogo.

[103] *flyExclusive Expands Fleet Commitment of Gogo AVANCE* (May 31, 2023), https://www.gogoair.com/news/2023/05/flyexclusive-expands-fleet-commitment-of-gogo-avance/; *see also NetJets Signs New Connectivity Agreement, Extending 20-Year Partnership*, (Nov. 7, 2023), https://ir.gogoair.com/news-releases/news-release-details/netjets-signs-new-connectivity-agreement-extending-20-year.; *Jet Edge Announces Partnership with Gogo Business Aviation to Provide 4G Connectivity*, (Oct. 25, 2023), https://ir.gogoair.com/news-releases/news-release-details/jet-edge-announces-partnership-gogo-business-aviation-provide-4g; *Airshare to Add Gogo AVANCE L3 to Fleet of Embraer Phenom 100s*, (Oct. 30, 2023), https://ir.gogoair.com/news-releases/news-release-details/airshare-add-gogo-avance-l3-fleet-embraer-phenom-100s.

would guarantee discounted service prices for the end user in exchange for Gogo receiving a guaranteed customer for at least three years. For example, one form of these agreements, Gogo's SmartShield program, was an exclusive dealing agreement enforced by severe penalties. With SmartShield, an end-user that decided to switch from to Gogo to SmartSky after thirteen months would have paid $96,000 in termination charges if their monthly service charges were $4,000 per month (24 months x $4,000/month).[104]

175. Gogo intended for these exclusive dealing agreements to maintain its monopoly by blocking SmartSky from the market. The effect of Gogo's exclusive and *de facto* exclusive dealing agreements with MROs, aircraft manufacturers, Fleet Operators, and individual jet owners was to substantially foreclose SmartSky from the ATG market at the most pivotal time for SmartSky. This strategy was intended to buy Gogo time to finish its "5G" network before losing enough of its market share to SmartSky that would enable SmartSky to survive in the ATG market.

176. The anticompetitive harm of these exclusive dealing agreements outweigh any procompetitive justification Gogo may propose.

Tech-Tie

177. Gogo has also unlawfully tied its ATG systems exclusively to its ATG network services and vice-versa.

178. Gogo's ATG equipment and ATG network services constitute two separate products for antitrust purposes. In fact, Gogo admits that it is "the ***only*** inflight connectivity provider that owns and optimizes its whole network infrastructure and is the only provider that manufactures the equipment for its onboard systems."[105]

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[104] *See* SmartShield Agreement, attached as **Exhibit B**.

[105] *Gogo 5G Explained*, https://www.gogoair.com/blog-posts/2019/gogo-5g-explained (last accessed Dec. 2, 2024) (emphasis added).

179. Gogo has technologically tied its ATG systems to its ATG network services by requiring those that buy its ATG systems to also buy Gogo's network services and vice-versa. The "forcing" component of the tying arrangement comes from the fact that Gogo has intentionally prevented interoperability between its own ATG systems and competitors'/potential future competitors' ATG services and its competitors' ATG systems and Gogo's own ATG services. Upon information and belief, Gogo designed its systems in that way with the specific intent to maintain its monopoly on both ATG systems and ATG services.

180. Upon information and belief, Gogo has not released the technical information that would be necessary for efficient rivals to offer ATG equipment or networks compatible with Gogo's.

181. The design features of Gogo's ATG equipment and network that prevent interoperability confer no technological benefit and are not essential to the technologies' functions.

182. Gogo has sufficient market power in both the equipment and services markets to coerce consumers into accepting the tied products together.

183. And Gogo's arbitrary and intentional incompatibility has had anticompetitive effects on the market for both ATG systems and ATG services. For example, had Gogo not unlawfully tied its equipment and services together, SmartSky would have had a window of opportunity. Once SmartSky came to market, consumers could have purchased and used SmartSky's equipment with Gogo's network—a network for which Gogo has no functioning systems to this day. Gogo's tech-tie also indirectly harmed competition by preventing firms from being able to enter this market as specialist sellers of just ATG systems or just ATG services. A firm more efficient at making equipment than Gogo could enter this market but for Gogo's network being compatible only with Gogo's ATG equipment.

Gogo Stole SmartSky's Chance to Enter the Market

184. SmartSky completed the commercial launch of the SmartSky Network in July 2022.

185. But despite SmartSky beating Gogo "5G" to market by almost three years and counting, despite the SmartSky Network being obviously technologically superior to any product Gogo has successfully launched, despite SmartSky's revolutionary technologies generating more than $700 million in investor capital, and despite SmartSky pre-selling more than one hundred systems prior to launch, SmartSky only ever installed and activated about thirty of its systems onto aircraft.

186. Going against Goliath is always hard. But it was Gogo's lying, cheating, and comprehensive anticompetitive campaign to steal SmartSky's chance to enter the market that created insurmountable barriers to entry, forced SmartSky out of business, and maintained Gogo's monopoly.

187. Gogo's unlawful and anticompetitive tactics directly caused SmartSky's low sales numbers.

188. Gogo's unlawful and anticompetitive tactics directly caused SmartSky to eventually lose funding.

189. As a result, in August 2024, SmartSky ceased operations.

Relevant Geographic Market

190. The relevant geographic market is the United States. SmartSky only ever operated its ATG network in the U.S., Gogo operates its ATG network almost entirely in the U.S.,[106] and the vast majority of aircraft equipped with Gogo or SmartSky ATG systems fly almost entirely

[106] *Business Breakdowns: Oakleigh Thorne – Gogo: Internet for Private Jets,* Colossus (June 22, 2022), https://www.joincolossus.com/episodes/90983440/thorne-gogo-internet-for-private-jets?tab=transcript ("[O]ur network, the ATG network I was describing a moment ago, is solely in the United States and Southern Canada, pretty much as far up as people generally fly in Canada.").

within the U.S. (The vast majority of business aviation aircraft are super midsize and smaller. Aircraft that size generally don't have the range for transoceanic flight.)

Relevant Markets

191. There are two relevant markets at issue in this case: (1) the wholesale market for ATG systems and (2) the market for ATG services.

192. The relevant markets do not include either narrowband or broadband satellite IFC systems.

193. Narrowband systems do not perform the same function as broadband systems. As Gogo advertises for its own Iridium narrowband systems, narrowband systems are used for voice communications and "narrowband data applications" such as fax, cockpit data, data safety.[107]

194. There are two types of broadband satellite IFC systems: geostationary orbit (GEO) satellite based systems and next-generation low earth orbit (LEO) satellite systems. At least five practical indicators show that neither type of satellite system is a reasonable substitute for ATG.

195. First, while ATG systems can be installed onto aircraft of any size, satellite systems do not fit onto anything but the largest classes of business aviation aircraft.[108] ATG systems and satellite systems therefore have distinct customers.

196. Second, to the extent that the end users for satellite systems and ATG systems overlap, these consumers view satellite-based systems as complements to their ATG systems, not substitutes.[109] The business aviation aircraft that can be equipped with ATG and satellite systems

[107] *Gogo Business Aviation, Iridium*, available at https://www.gogoair.com/connectivity/additional-global-solutions/ (last viewed December 12, 2024).

[108] *Business Breakdowns: Oakleigh Thorne – Gogo: Internet for Private Jets*, Colossus (June 22, 2022), https://www.joincolossus.com/episodes/90983440/thorne-gogo-internet-for-private-jets?tab=transcript ("[GEO] equipment is quite heavy and it's quite bulky. So it really only fits on large jets.").

[109] *Business Breakdowns: Oakleigh Thorne – Gogo: Internet for Private Jets*, Colossus (June 22, 2022), https://www.joincolossus.com/episodes/90983440/thorne-gogo-internet-for-private-jets?tab=transcript ("We also coexist in a lot of those planes. A lot of them have ATG and geo satellite. And when they get outside the U.S., they flip on the GEO satellite service. And when they're over the U.S., they use us.").

are mostly large cabin jets and bizliners. These classes of business aviation aircraft, unlike smaller business aviation aircraft, are commonly used for transoceanic flights. Therefore, they are often equipped with satellite systems for more expensive broadband access over oceans, ATG systems for less expensive broadband access when over land, or both for redundancy.

197. Third, satellite systems are significantly more expensive to purchase and install and have significantly higher monthly service costs than ATG systems. In fact, Gogo's CEO has publicly said multiple times that satellite equipment is generally two times the cost of ATG equipment *and* more expensive to operate.[110]

198. Fourth, for the majority of the predatory period, LEO satellite systems had barely entered the market. There are only two LEO systems being sold today—SpaceX's Starlink and Gogo's Galileo. Upon information and belief, Starlink did not begin to be installed until late 2023 and, as of today, likely has less than 200 systems installed on business aviation aircraft.[111] Gogo has yet to install a single Galileo system onto a customer's plane.

199. Finally, GEO satellite systems do not perform at the same level as ATG systems on the two key performance metrics for business aviation consumers: latency and bandwidth.

[110] *See, e.g.*, *As the Business Jet Market Flourishes, Gogo Flies High: An Exclusive Interview with Gogo CEO Oakleigh Thorne*, Satellite Mobility World, Sept. 2021, at 24 ("ATG is much more economical to install and operate than satellite. GEO satellite costs are typically more than twice as expensive as ATG for the equipment, and installation for GEO satellite can be much more expensive than for ATG. . . . On top of that, service plans for satellite can be anywhere from two to ten times the cost of our service plans, and with GEO satellite, you have to pay higher fees for more speed and bandwidth."); *Business Breakdowns: Oakleigh Thorne – Gogo: Internet for Private Jets*, Colossus (June 22, 2022), https://www.joincolossus.com/episodes/90983440/thorne-gogo-internet-for-private-jets?tab=transcript ("They're expensive to install. The equipment's very expensive. And they are very expensive in terms of the service plans.").

[111] Upon information and belief, SpaceX does not publicize the precise number of Starlink systems installed onto business aviation aircraft. This figure is a good-faith estimate based on the best information available. *See, e.g.*, @Starlink, (October 20, 2023), X (formerly known as Twitter)("Starlink is currently installed and being used on more than 70 aircraft with over 400 additional planes on contract"), https://x.com/Starlink/status/1715441244653212090.

System	Approximate Purchase/Installation Price	Approximate Monthly Service Price	Download/Upload Speeds	Key Features	Suitability for Particular Aircraft
ATG	$140,000 MSRP $100,000 + installation	$10,000 for unlimited data[112]	Fast both ways	Low latency, high bandwidth	Used for all classes of BA aircraft
GEO	$350,000 - $500,000 MSRP + $200,000 installation	$15,000+	Fast download speeds, very slow upload speeds	High latency, low bandwidth	Fit only on large jets and biz-liners
LEO	$150,000 MSRP + $100,000 installation	$10,000 (recently decreased from $25,000)[113]	Fast both ways	Low latency, high bandwidth	Super-midsize jets and larger

200. Combined, these factors result in ATG systems and satellite-based systems being part of two separate product markets.

201. Gogo has itself recognized repeatedly and publicly that ATG systems and satellite-based systems did not compete in the same product market during the relevant period:

> • Gogo CEO interview in *Satellite Mobility World*, September 2021: "In the domestic mid-size and light jet market, we expect ATG to be the dominant product for the foreseeable future, especially with the enhancements we have planned with 5G and beyond. In the U.S., we don't think customers that have ATG will remove it from their aircraft to install an ESA/LEO product."[114]
>
> • Gogo 2017 Q3 Earnings Call: "[M]ost big global planes invest in a global solution [satellite] and then add our air-to-ground when they're in the US because it's higher performing than the global solutions."[115]
>
> • Gogo 2020 Q4 Earnings Call: "Our equipment is small and light compared to satellite equipment and fits on midsized, light, jet

[112] This price was as of August 2024.

[113] *See SpaceX Lowers Monthly Pricing for Starlink Aviation in BizAv*, Runway Girl Network, (Feb. 16, 2024), https://runwaygirlnetwork.com/2024/02/spacex-lowers-monthly-pricing-for-starlink-aviation-in-bizav/.

[114] *As the Business Jet Market Flourishes, Gogo Flies High: An Exclusive Interview with Gogo CEO Oakleigh Thorne*, Satellite Mobility World, Sept. 2021, at 27.

[115] Q3 2017 Earnings Call, at 16.

and turboprop aircraft that cannot support the size and weight of satellite equipment. Even in the large jet market, we have more jets activated in the U.S. than all of our traditional satellite competitors combined because our equipment and service is lower cost and our services is of equivalent or better quality given its low latency."[116]

- Gogo 2021 Q3 Earnings Call: "Let's start with GEO satellite service providers. Their main advantage is that they have broader coverage than Gogo. However, since 87% of all BA flights are in the U.S., Gogo can still serve most BA aircraft missions. As mentioned earlier, Gogo's advantages over GEOs are: a, smaller form factors, allowing us to serve all makes and models of aircraft while GEO providers have heavier and larger form factors and are limited to larger jets; b, a significant latency advantage, which is very important for interactive video applications like Zoom; and c, Gogo is cheaper on all fronts, including equipment, installation and service."[117]

- Gogo 2022 Q4 Earnings Call: "[W]e see ATG 5G and GBB [Gogo's satellite system] as complementary elements of our product portfolio . . . . "Starlink has entered the market at the high end, I would say that given with the large antenna aimed at competing with GEO satellite providers, in the heavy jet sort of segment of the market at a pretty, I think, a price that's competitive with GEO, but it's a lot higher than our pricing."[118]

- Gogo Q3 2023 Earnings Call: "[W]e see these products as being positioned to very different segments of the market. . . . The 5G is really aimed at the U.S. market because that's its coverage. It's aimed at those sort of medium-sized jets on down that want a really good product but are still somewhat cost conscious, right? They want an affordable product. And 5G will be cheaper than any satellite product. The HDX is aimed at sort of medium-sized jets on down outside the U.S. And those planes today have no connectivity option whatsoever. No broadband connectivity option whatsoever. And medium-size jets on down that fly outside the U.S. like to the Caribbean or Canada or Mexico, et cetera, Hawaii, which is in the U.S., of course, but it's over a large piece of ocean. So that's where that's aimed. And then the FDX is a heavy jet product. And that's for the big jets that either fly around the U.S. and want a lot of connectivity or fly transcontinental routes. So it's going to be more aimed probably at the transcontinental planes. So they're very different segments, and we're trying to be very prudent with the

[116] Q4 2020 Earnings Call, at 4.
[117] Q3 2021 Earnings Call, at 5.
[118] Gogo, *Q4 2022 Gogo Inc. Earnings Call*, Refinitiv StreetEvents, Feb. 28, 2023, at 6.

market in terms of communicating which products should be the right products for each segment."[119]

- Gogo 2024 Q2 Earnings Call: "Gogo 5G, which is targeted at segments of the 21,000 midsized and smaller business aircraft market that fly predominantly in the U.S. and want a good connectivity experience at a more affordable price than satellite solutions."[120]

- Gogo 2024 Q3 Earnings Call: "Combined with Satcom Direct, Gogo will be able to serve every segment of the BA market with the very best solutions for that segment. From our proprietary air to ground networks including Gogo 5G that deliver excellent reliable and cost effective connectivity for the thousands of aircraft that fly regionally in the U.S. to integrated multi orbit Leo GEO solutions to meet the high bandwidth, high reliability and white glove service needs of the most demanding global heavy jet customer. . . . Now let me turn to our 5G ATG network which is targeted at large segments of the roughly 21,000 midsize and smaller business aircraft that fly predominantly in the U.S. and want an exceptional connectivity experience at a more affordable price than satellite solutions."[121]

202. Because ATG and satellite are the only two types of technologies that have ever been used to provide internet to business aviation aircraft, and because satellite systems are not reasonable substitutes for ATG systems, there were no reasonable substitutes for ATG systems during the relevant period.

Gogo's Market Power and Barriers to Entry

203. Today, with a 100% share of the ATG market, Gogo boasts of being a monopolist:

"[W]e have close to 5,000 broadband planes and 5,000 satellite planes in Business Aviation, and SmartSky is still looking for their first. ***So we've got a long ways to go before you can even conceivably have a duopoly***."[122]

[119] Q3 2023 Earnings Call, at 12.
[120] Gogo, *Q2 2024 Gogo Inc. Earnings Call*, Refinitiv StreetEvents, Aug. 7, 2024, at 5.
[121] Q3 2024 Earnings Call, at 3, 6.
[122] *See e.g.*, Q4 2017 Earnings Call, at 15 (Gogo President, CEO & Director at the time commenting on SmartSky's attempted entrance into the market)(emphasis added).

204. Even if the relevant product market was incorrectly and broadly defined to include all forms of IFC broadband—ATG, LEO, and GEO—Gogo is still a monopolist and still has monopoly power. As of February 2023, there were about 24,700 business aviation aircraft in the U.S. About 7,400 (approximately 30%) were equipped with either ATG, LEO, or GEO. And 6,935 of those 7,400 connected aircraft used Gogo ATG. So, in February 2023, about 94% of the 7,410 business aviation aircraft with broadband IFC used Gogo.[123]

205. And even if narrowband forms of IFC are incorrectly included in the relevant product market, Gogo is still a monopolist and still has market power. After Gogo's recent acquisition of Satcom Direct, Gogo has an 87% combined market share across *all* IFC products and services, including non-broadband IFC.

206. Again, none of this is a secret:

- In 2019, Gogo reported "while we are currently the only provider of ATG service in the U.S., a competitor is developing a U.S. air-to-ground 4G network that may become available this year using unlicensed spectrum."[124]

- In late 2022, Gogo acknowledged in public disclosures that SmartSky's attempted entry was "the first time that we have faced competition from a nationwide ATG network."[125]

207. In addition to its monopoly status, Gogo has demonstrated its market power in multiple ways. For example, Gogo has already shown its intention and ability to recoup monopolistic profits after SmartSky's exit. Throughout 2024, SmartSky and Gogo were competing against each other for a deal with a Fleet Operator. SmartSky's superior product eventually convinced the Fleet Operator to choose SmartSky over Gogo. However, because SmartSky was forced to close its doors, the Fleet Operator eventually returned to Gogo to accept Gogo's previous

[123] *See* Gogo 2022 Annual Report (10-K) at 5, 7, 38.
[124] Gogo 2019 10-K at 24.
[125] Gogo 2022 10-K at 16.

offer. Knowing that it had returned to its status as a complete monopolist once again, upon information and belief, Gogo significantly increased the price of its offer.

208. At least seven barriers to entering the ATG market have helped Gogo maintain its monopoly power.

209. First are the massive initial startup costs. Creating, maintaining, and operating an ATG network requires a massive initial capital investment. For Gogo, it cost over $800 million.[126]

210. Second, those massive initial fixed costs make the breakeven point significantly high for a firm entering the ATG market—a company cannot survive in the ATG market by only serving a few dozen planes. According to SmartSky, it needed over 700 planes to breakeven, while Gogo said that SmartSky needed thousands and Gogo itself needed thousands. This scale is the second barrier to entry.[127]

211. Third and relatedly, for an ATG network to service an aircraft, it must provide ATG services everywhere that plane will fly. Almost all business aircraft are used to travel all across the continental United States. Thus, consumer demand for IFC services is on a nation-wide scale. For an ATG firm to survive in this market, it therefore must have the scale necessary to provide services throughout at least the contiguous United States.

212. The fourth barrier to entry is the previously described "stickiness."

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[126] *See* Q3 2021 Earnings Call, at 4 ("I should add that it's not easy to build an ATG network nor is it easy to fund the operating loss as a network operator suffers between lighting up their network and activating enough customers to cover their operating costs. In Gogo's case, we need to raise more than $800 million in equity."); *see also As the Business Jet Market Flourishes, Gogo Flies High: An Exclusive Interview with Gogo CEO Oakleigh Thorne*, Satellite Mobility World, Sept. 2021, at 30.

[127] *As the Business Jet Market Flourishes, Gogo Flies High: An Exclusive Interview with Gogo CEO Oakleigh Thorne*, Satellite Mobility World, Sept. 2021, at 30.

213. The fifth barrier to entry are vertical agreements between ATG companies and the business aviation aircraft manufacturers, MROS, and Fleet Operators. Without these connections—which take both time and money to establish—market entry is impossible.[128]

214. Sixth are the required licenses and regulatory barriers necessary to install ATG equipment onto an aircraft and to operate an ATG network. Operating an ATG network, for example, requires multiple FCC licenses that take months to years to obtain. On the hardware side, the primary regulatory barriers are the previously mentioned Type Certificates and STCs. These certificates can create additional barriers to entry. Namely, after a particular model of aircraft is certified for a particular type of ATG system, Fleet Operators, other end-users, and aircraft manufacturers are much less inclined to go through the hassle of certifying a competing ATG system for the same type of aircraft (unless there is a significant price or performance advantage).

215. Finally, the seventh barrier to entry is now Gogo itself.[129] After Gogo's very public defeat of SmartSky through its anticompetitive activities, Gogo has acquired a reputation for predation that signals and dissuades new entrants from entering the ATG market, or risk facing Gogo's unlawful tactics.

INTERSTATE COMMERCE

216. The Sherman Act's "affecting commerce" requirement is met by conduct that is shown "as a matter of practical economics to have a not insubstantial effect on the interstate commerce involved."[130]

217. This Complaint alleges that a monopolist's conduct caused or contributed to the failure of its sole competitor in a nationwide market.

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[128] *See id.*

[129] *Id.* (noting that SmartSky's "ramp-up is going to be slow since we [Gogo] already serve most of the large fleets.").

[130] *McLain v. Real Estate Bd., Inc.*, 444 U.S. 232, 246 (1980).

218. This nationwide market itself, moreover, exists to enable interstate commerce-related communications to be transmitted during (what is normally) interstate travel.

219. The ATG market generates hundreds of millions of dollars in interstate commerce annually.

220. Gogo's anticompetitive activities substantially affected interstate commerce.

221. Therefore, "as a matter of practical economics," it is without question that Gogo's conduct had a not insubstantial effect on interstate commerce.

ANTITRUST INJURY

222. Gogo's anticompetitive conduct has prevented competition in the ATG market, causing antitrust injury and competitive harm to SmartSky.

223. But for Gogo's anticompetitive conduct, SmartSky would have had substantially higher revenues on both sides of the ATG market.

224. SmartSky thus suffered a significant antitrust injury, including severe financial damages, as a result of Gogo's anticompetitive conduct.

225. As a result of Gogo's anticompetitive conduct, SmartSky was caused to shut down in August 2024. After SmartSky's exit, consumers in the ATG market have no other option besides Gogo. This significantly reduced competition in the market, harming the competitive process to the detriment of customers. Thus, competition has been harmed in these markets as a result of SmartSky's forced exit.

CLAIMS FOR RELIEF

COUNT I
Sherman Act § 1 & Clayton Act § 3

226. SmartSky incorporates the facts and allegations from paragraphs 1 through 225 as if set forth fully herein.

227. The ATG market is a relevant antitrust market, and Gogo has monopoly power in that market.

228. Upon information and belief, Gogo formed unlawful exclusive or *de facto* exclusive dealing agreements with MROs, aircraft manufacturers, Fleet Operators, and individual jet owners in violation of Section 1 of the Sherman Act, 15 U.S.C § 1 and Section 3 of the Clayton Act, 15 U.S.C. § 14.

229. Gogo also formed other agreements with MROs to unreasonably restrain interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14.

230. Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy" that unreasonably restrains trade.[131]

231. Section 3 of the Clayton Act prohibits any person engaged in commerce from conditioning the lease or sale of goods or commodities upon the purchaser's agreement not to use the products of a competitor, if the effect may be "to substantially lessen competition or to tend to create a monopoly in any line of commerce."[132]

232. Upon information and belief, Gogo's monopolistic tactics involved agreements with MROs under which the MROs would (1) not purchase SmartSky ATG systems; (2) not fund SmartSky's STCs; (3) not work with SmartSky to obtain STCs; and (4) maintain retail prices for Gogo's products at predatorily low levels.

233. There are no procompetitive justifications for Gogo's monopolistic agreements, and any proffered procompetitive justifications either do not exist or could have been achieved through less restrictive means.

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[131] *See* 15 U.S.C. § 1; *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).
[132] 15 U.S.C. §14.

234. Gogo's monopolistic conduct is a *per se* violation of Section 1 of the Sherman Antitrust Act, but also violates Section 1 of the Sherman Antitrust Act under a rule of reason analysis.

235. SmartSky has been damaged as a direct and proximate result of Gogo's actions.

236. SmartSky requests the following relief for Gogo's unlawful and monopolistic conduct:

a. An award of its actual damages in an amount to be proven at trial in this matter;

b. Treble damages as authorized by law;

c. Costs incurred in bringing this suit;

d. An award of its attorney's fees;

e. Pre- and post-judgment interest; and

f. Interest on its actual damages under 15 U.S.C. § 15(a).

COUNT II
Sherman Act § 2 & Clayton Act § 3

237. SmartSky incorporates the facts and allegations from paragraphs 1 through 225 as if set forth fully herein.

238. The elements of a monopolization claim under Section 2 of the Sherman Act are: (1) the defendant's possession of monopoly power in the relevant market; and (2) "the willful acquisition or maintenance of that power."[133]

239. The elements of an attempted monopolization claim under Section 2 of the Sherman Act are: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."[134]

[133] *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).
[134] *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

240. Section 3 of the Clayton Act prohibits any person engaged in commerce from conditioning the lease or sale of goods or commodities upon the purchaser's agreement not to use the products of a competitor, if the effect may be "to substantially lessen competition or to tend to create a monopoly in any line of commerce."[135]

241. The ATG market is a relevant antitrust market and Gogo has monopoly power in that market.

242. Gogo has willfully maintained and abused its monopoly power in the ATG market by engaging in multiple forms of exclusionary conduct, including those described above.

243. Gogo committed anticompetitive acts with the specific intent to monopolize the ATG market.

244. Gogo's unlawful conduct foreclosed a substantial share of the ATG market.

245. Gogo's unlawful conduct has harmed competition and consumer welfare.

246. The anticompetitive effects of Gogo's exclusionary conduct outweigh any procompetitive benefits or can be achieved through pro-competitive or less anticompetitive means.

247. Gogo's anticompetitive and exclusionary acts violate Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 3 of the Clayton Act, 15 U.S.C. § 14.

248. Gogo's anticompetitive and exclusionary acts, while illegal in isolation, should be considered holistically as "part of a singular, coordinated anticompetitive effort" to exclude SmartSky by employing a "single campaign to foreclose competition" in the U.S. ATG market.[136]

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[135] 15 U.S.C. § 14.

[136] *See Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 111 F.4th 337, 356 (4th Cir. 2024), *reh'g en banc denied*, --- F. 4th ----, 2024 WL 4891183 (4th Cir. Nov. 26, 2024).

249. SmartSky has been damaged as a direct and proximate result of Gogo's anticompetitive and exclusionary acts.

250. SmartSky requests the following relief for Gogo's unlawful and anticompetitive conduct:

a. An award of its actual damages in an amount to be proven at trial in this matter;

b. Treble damages as authorized by law;

c. Costs incurred in bringing this suit;

d. An award of its attorney's fees;

e. Pre- and post-judgment interest; and

f. Interest on its actual damages under 15 U.S.C. § 15(a).

COUNT III
Section 43(a) of the Lanham Act (15 U.S.C. § 1125(a))

251. SmartSky incorporates the facts and allegations from paragraphs 1 through 225 as if set forth fully herein.

252. As set forth above, Gogo's conduct constitutes false advertising because it contains false and misleading representations and descriptions that are likely to mislead and have already misled consumers about the nature, characteristics and quality of Gogo's products and services and SmartSky's products and services.

253. Gogo's false advertisements are likely to cause and have already caused consumers to falsely believe that Gogo's "Gogo Biz 4G" technology is equal to SmartSky's Network, and that Gogo's forthcoming "Gogo 5G" technology is superior to SmartSky's Network, among other things, all in violation of Section 43(a) of the Lanham Act.

254. Gogo intentionally made and is continuing to intentionally make these false representations and descriptions to deceive consumers into believing that (1) Gogo's "Gogo Biz 4G" technology is 4G; (2) that Gogo's current network is equal to SmartSky's Network; (3) that Gogo's forthcoming "Gogo 5G" technology is superior to SmartSky's Network; and (4) that "Gogo 5G" has always been right around the corner.

255. Gogo intentionally made false representations and descriptions to deceive consumers into believing, among other things, that: (1) unlicensed spectrum could not be used for an ATG network; (2) SmartSky lacked the investor funding to establish and operate an ATG network; (3) SmartSky's *peak* data speeds were 2 Mbps; and (4) SmartSky's network had 6 MHz of bandwidth.

256. Gogo's false and misleading statements have a tendency to deceive a substantial portion of Gogo's intended audience, and, upon information and belief, Gogo's false and misleading statements have actually deceived consumers.

257. Gogo's false and misleading statements are material, in that they are likely to influence purchasing decision and they describe a core, inherent quality or characteristic of ATG.

258. As a direct and proximate result of Gogo's false and misleading statements, Gogo caused damages to SmartSky's business, reputation, and goodwill, and caused financial harm to SmartSky through lost sales, profits, and investments that would have occurred but for Gogo's false and misleading statements, in an amount to be determined at trial.

259. Gogo received revenue from these false and misleading statements in an amount to be determined at trial.

260. Gogo's false and misleading statements are violations of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

261. SmartSky requests the following relief for Gogo's unlawful and anticompetitive conduct:

a. A finding that Gogo used false or misleading representations of its Gogo Biz 4G and Gogo 5G products;

b. An award of SmartSky's actual damages in an amount to be proven at trial in this matter;

c. A finding that Gogo's conduct was willful or wanton;

d. Gogo's profits from its sales at issue in this suit;

e. Destruction of any remaining Gogo Biz 4G and/or Gogo 5G products that are identified as such, and destruction of any other labels, signs, prints, packages, wrappers, receptacles, and advertisements that are false or misleading;

f. Costs incurred in bringing this suit;

g. An award of its attorney's fees as permitted by law; and

h. Pre- and post-judgment interest.

COUNT IV
N.C. Unfair and Deceptive Trade Practices Act (N.C. Gen. Stat. § 75-1.1 *et seq*.)

262. SmartSky incorporates the facts and allegations from paragraphs 1 through 225 as if set forth fully herein.

263. The North Carolina Unfair and Deceptive Practices Act makes it illegal to engage in unfair methods of competition and other unfair or deceptive acts or practices.[137] Specifically, it provides that "[u]nfair methods of competition in or affecting commerce is unfair or deceptive acts or practices on or affecting commerce are unlawful."

264. Conduct done with the intent of eliminating competition in the market at the expense of customers also violates N.C. Gen. Stat. § 75-2.1, which provides that "[i]t is unlawful

[137] *See* N.C. Gen. Stat. § 75-1.1 *et seq*.

for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of trade or commerce in the State of North Carolina."

265. Gogo was and is engaged in business in the State of North Carolina.

266. Gogo's above-described actions are inherently unfair and constitute deceptive acts or trade practices in violation of N.C. Gen. Stat. § 75-1.1 *et seq*.

267. Gogo's above-described actions are not a one-time event; Gogo has committed these actions at length, over the course of nearly a decade.

268. Gogo's unfair and deceptive acts and trade practices have affected, and continue to affect, commerce. Gogo's business activities do not constitute services rendered by a member of a learned profession.

269. Gogo's unfair and deceptive acts and trade practices have had a negative impact on the public within the State of North Carolina and they were done with the intent of eliminating competition in the market and protecting its monopoly.

270. Gogo's unfair and deceptive acts are capable of repetition.

271. SmartSky has been damaged as a direct and proximate result of Gogo's actions.

272. SmartSky requests the following relief for Gogo's unlawful and anticompetitive conduct:

a. An award of its actual damages in an amount to be proven at trial in this matter;

b. Treble damages as authorized by law;

c. Costs incurred in bringing this suit;

d. An award of its attorney's fees; and

e. Pre- and post-judgment interest.

COUNT V
Tortious Interference with Contract

273. SmartSky incorporates the facts and allegations from paragraphs 1 through 225 as if set forth fully herein.

274. To bring a claim for tortious interference with contract under North Carolina law, a litigant must show: (1) the existence of a valid contract between the claimant and a third person which confers upon the plaintiff a contractual right; (2) that the defendant was aware of the contract; (3) that the defendant intentionally induced the third party not to perform under the contract; (4) that the defendant did so without justification; and (5) resulting damages.[138]

275. SmartSky entered into approximately twenty contracts with MROs around 2021 and 2022 through dealer agreements.

276. The objective of these dealer agreements was for MROs to purchase SmartSky's equipment to sell and install onto aircraft for end-users.

277. Upon information and belief, Gogo pressured some of these MROs against conducting business with SmartSky.

278. SmartSky's dealer agreements were valid and binding contracts that conferred unto SmartSky contractual rights vis-à-vis its dealers.

279. Upon information and belief, Gogo was aware of the dealer agreements existing between SmartSky and these MROs.

280. Gogo intentionally induced the MROs to breach the terms of the dealer agreements through the above-described wrongful means.

[138] *Doe v. Univ. of N. Carolina Sys.*, No. 1:23-CV-00041-MR, 2024 WL 925549, at *14 (W.D.N.C. Mar. 4, 2024); *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988).

281. Gogo acted entirely without justification in inducing the MROs to breach the terms of their dealer agreements.

282. SmartSky has been damaged as a direct and proximate result of Gogo's actions.

283. SmartSky requests the following relief for Gogo's unlawful conduct:

a. An award of its actual damages in an amount to be proven at trial in this matter;

b. A finding that Gogo's conduct was willful or wanton;

c. Punitive damages as authorized by N.C. Gen. Stat. § 1D-15;

d. Costs incurred in bringing this suit;

e. An award of its attorney's fees; and

f. Pre- and post-judgment interest.

COUNT VI
Tortious Interference with Prospective Economic Advantage

284. SmartSky incorporates the facts and allegations from paragraphs 1 through 225 as if set forth fully herein.

285. To bring a claim for tortious interference with prospective economic advantage, a plaintiff must show that a party interfered with a business relationship by maliciously inducing a third-party to not enter into a contract with the plaintiff that the third-party would have entered into but-for the interference.[139]

286. Through 2024, SmartSky and Gogo competed against each other for a deal with a specific Fleet Operator.

[139] *Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC*, 368 N.C. 693, 701, 784 S.E.2d 457, 463 (2016); *see also RCDI Const., Inc. v. Spaceplan/Architecture, Plan. & Interiors, P.A.*, 148 F. Supp. 2d 607, 617 (W.D.N.C. 2001), *aff'd sub nom. RCDI Const., Inc. v. Space/Architecture Plan. & Interiors, P.A.*, 29 F. App'x 120 (4th Cir. 2002).

287. Upon information and belief, Gogo was aware of SmartSky's efforts to secure a contract with this Fleet Operator.

288. SmartSky's superior product eventually convinced the Fleet Operator to select SmartSky's ATG network over Gogo's 5G network.

289. SmartSky and the Fleet Operator were close to finalizing an agreement with each other when Gogo interfered with that relationship and prevented SmartSky and the Fleet Operator from entering into a contract.

290. Through its wrongful actions described herein, Gogo induced the Fleet Operator not to enter into an agreement with SmartSky, and SmartSky eventually was forced to close its doors and cease business operations.

291. Gogo had no legitimate business purpose to step in between SmartSky and the Fleet Operator, other than to eliminate competition and force SmartSky to shut down its network.

292. Gogo acted entirely without justification in stepping between the prospective agreement between SmartSky and the Fleet Operator.

293. But-for Gogo's wrongful actions, SmartSky and the Fleet Operator would have entered into a contract whereby SmartSky would have provided access to its ATG network to the Fleet Operator.

294. SmartSky has been damaged as a direct and proximate consequence of Gogo's interference with its prospective business relationship with the Fleet Operator.

295. SmartSky requests the following relief for Gogo's unlawful and anticompetitive conduct:

a. An award of its actual damages in an amount to be proven at trial in this matter;

b. A finding that Gogo's conduct was willful or wanton;

c. Punitive damages as authorized by N.C. Gen. Stat. § 1D-15;

d. Costs incurred in bringing this suit;

e. An award of its attorney's fees; and

f. Pre- and post-judgment interest.

DEMAND FOR TRIAL BY JURY

296. Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, SmartSky demands a trial by jury in this action.

Respectfully submitted, this 16th day of December, 2024.

/s /G. Wade Leach, III
Lance A. Lawson, P.E. (NC Bar No. 23835)
G. Wade Leach, III (NC Bar No. 54895)
Mason P. Veal (NC Bar No. 62110)
BURR & FORMAN LLP
101 South Tryon Street, Suite 2610
Charlotte, NC 28280
T: (704) 347-1170
F: (704) 347-4467
E-mail: llawson@burr.com
E-mail: wleach@burr.com

-AND-

Rik S. Tozzi (*pro hac vice forthcoming*)
Robert Rutherford (*pro hac vice forthcoming*)
Gerald P. Gillespy (*pro hac vice forthcoming*)
John Wilson Booth (*pro hac vice forthcoming*)
BURR & FORMAN LLP
420 North 20th Street, Suite 3400
Birmingham, AL 35203
T: (205) 251-3000
F: (205) 458-5100
E-mail: rtozzi@burr.com
E-mail: rrutherford@burr.com
E-mail: ggillespy@burr.com
E-mail: jwbooth@burr.com
ATTORNEYS FOR PLAINTIFF SMARTSKY NETWORKS, LLC